IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 18

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Appellee, and THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 36

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Respondent, and THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPELLANTS' BRIEF

(For List of Counsel see inside front cover)

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

No. 401 Filed September 10, 1956
No. 401—Jurisdiction Postponed January 14, 1957
No. 563 Petition for Certiorari Filed November 13, 1956
No. 563—Certiorari Granted January 14, 1957

LIST OF ATTORNEYS

CITY OF DETROIT, a Michigan municipal
corporation, Petitioner,
By PAUL T. DWYER,
Its Corporation Counsel,
VANCE G. INGALLS,
JULIUS C. PLISKOW,
G. EDWIN SLATER,
Assistants Corporation Counsel,

and

COUNTY OF WAYNE, a Michigan Constitutional
Body Corporate, Petitioner,
By GERALD K. O'BRIEN,
Prosecuting Attorney and
HOBART TAYLOR, JR.,
THOMAS J. FOLEY, JR.,
ELIZABETH L. STACK,
Assistant Prosecuting Attorneys,
and
ALBERT E. CHAMPNEY,
Of Counsel.

INDEX

	Page
Opinions below	2
Jurisdiction	3
Statutes involved	7
Questions presented	8
Statement of case	9
Nature of assessment and tax	9
Form and provisions of contracts	11
Analysis of partial payment provisions	12
Proceedings in District Court	15
Stipulated facts	15
Summary of argument	22
Argument	
I. Were provisions for transfer of title to United States of materials in possession of an independent sub-contractor unauthorized under Federal law?	
The Courts below answered "No." Appellants contend the answer should be "Yes"	28
A. Congressional view of Advance-Partial payments	33
B. Congressional intent in considering H. R. 1366 (Armed Services Procurement Act)	37
C. Authority must be found in statute	46
D. Allegheny not controlling here	47

Page

II. If inclusion of title transfer provisions was authorized, did related contract terms and the undisputed course of conduct, nevertheless, establish ownership in appellee and paper title in the Government?

The lower courts answered "No." Appellants contend the answer should be "Yes" 52

A. Purpose of Partial payment-title vesting clauses in Government contract..... 54

B. The Court's approach to tax questions... 55

C. Basic principles of ownership..... 57

D. Provisions of the contract do not establish ownership in the Government..... 58

E. The conduct of the parties was inconsistent with the claim of beneficial title in the Government 69

F. Army regulations treat payments, whether partial, progress or advance, as method of financing 72

III. Are these state and local tax laws and nondiscriminatory taxes levied thereunder valid as imposing no direct burden on the Federal Government in violation of its implied constitutional immunity?

The Courts below answered "No." Appellants contend the answer should be "Yes" 77

A. Doctrine of Implied constitutional immunity 77

B. Nature and impact of the tax..... 94

C. Liability or responsibility for payment of the tax 102

Page

D. Substance and effect of this tax do not constitute interference with means of operations of Government 113

E. Allegheny compared and distinguished .. 120

Conclusion 130

Appendix 1a

AUTHORITIES CITED

Decisions

Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607 46

Alabama, State of v. King and Boozer, 314 U. S. 1 ..... 44, 45, 85, 110, 123, 124

American Motors Corp. and United States, Intervenor, v. City of Kenosha, 274 Wis. 315, 80 N. W. 2d 363 ..... 60, 62, 65, 68

Bank of Louisville v. Kentucky, 76 U. S. 701 ..... 82, 83

Benton v. Commissioner of Internal Revenue, 197 Fed. 2d 745, 754 57

Bradford Electric Light Co. v. Clapper, 284 U. S. 221 7

Carstairs v. Cochran, 193 U. S. 14 103

City of Detroit v. Gray, 314 Mich. 516, 22 N. W. 2d 771 102

City of Detroit v. Stafford, 320 Mich. 6, 30 N. W. 2nd 410 ..... 102, 103

Clallam County v. United States, 263 U. S. 341 110

Commissioners v. Court Holding Co., 324 U. S. 331 ..... 56, 57

Continental Casualty Co. v. United States, 113 F. 2d 284 46

Corliss v. Bowers, 281 U. S. 376 56

Page

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 5

Detroit Shipbuilding Company v. City of Detroit, 228 Mich. 145, 199 N. W. 645, 135 A. L. R. 597 102

Detroit Trust Co. v. Detroit, 269 Mich. 81, 256 N. W. 811 ..... 101, 103

Dunitz v. Pick Co., 241 Mich. 55, 216 N. W. 382.. 101

Esso Standard Oil v. Evans, 345 U. S. 495..... 85, 124

Federal Land Bank v. Bismarck, 314 U. S. 95.... 106, 123

Federal Trade Commission v. Raladam Co., 283 U. S. 643..... 47

Flanigan v. Police Jury, 82 So. 722..... 97

Gillespie v. Oklahoma, 257 U. S. 501..... 86

Graves v. New York, 306 U. S. 466:...85, 90, 110, 117, 124

Graves v. Texas Co., 298 U. S. 393..... 86

Griffiths v. Commissioner, 308 U. S. 355..... 75

Helvering v. F. R. Lazarus and Co., 308 U. S. 252 55

Helvering v. Mountain Producers, 303 U. S. 376 85, 90, 93, 124

Indian Motorcycle Co. v. United States, 283 U. S. 570 86

Kelly v. Herrall, 20 Fed. 364..... 98

Kennedy v. Mason, 324 U. S. 249..... 4

James v. Dravo Contracting Company, 302 U. S. 134, 85, 87, 91, 110, 124

Kern-Limerick, Inc. and United States of America v. Scurlock, 347 U. S. 110.....4, 41, 43, 44, 52, 93, 112, 117

Land O'Lakes Dairy Co. v. Wadena County, 229 Minn. 103, 39 N. W. 2d 164..... 103

Lane County v. Oregon, 74 U. S. 101..... 83

Lionberger v. Rowse, 76 U. S. 721..... 82

Longest v. Langford, 274 U. S. 499..... 4

M'Culloch v. Maryland, 4 Wheat. 579.....77, 91, 120, 124

Page

MacEvoy Company, Clifford F. v. United States of America, 322 U. S. 102 29
Madden v. Kentucky, 309 U. S. 83 6
Manhattan General Equipment Company v. Commissioner of Internal Revenue, 297 U. S. 129 47
Metcalf v. Mitchell, 269 U. S. 523 ..... 85, 89, 91
Mills v. Scott, 99 U. S. 25 30
New Brunswick v. United States, 276 U. S. 547, 105, 108, 109, 110, 124
New York v. Latrobe, 279 U. S. 421 6
Northern National Bank v. Northern Bank, 244 Minn. 202, 70 N. W. 2d 118 104
Oklahoma Tax Comm. v. Texas Co., 336 U. S. 342 85, 92, 104, 124, 128
Oklahoma Tax Comm. v. U. S., 319 U. S. 598 124
Offutt Housing Co. v. Sarpy, 351 U. S. 252 ..... 53, 55, 71, 111, 114
Offutt Housing Co. v. Sarpy, 160 Neb. 320, 70 N. W. 2d 382 56
Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169 6
Panhandle Oil Co. v. Mississippi, 277 U. S. 218 ..... 86, 92
Penn Dairies v. Milk Control Com., 318 U. S. 261 47
Petition of Edward Hines Lumber Company, 196 Oregon 420, 248 P. 2d 720 107
Petition of S. R. A., Inc., 243 Minn. 487, 7 N. W. 2d 487 108
Priebe & Sons, Inc. v. United States, 332 U. S. 407 47
Reynolds Aluminum Co. v. Multnomah County, 206 Oregon 602 287 P. 2d 921 ..... 104, 107
Rogers v. Graves, 299 U. S. 401 86
Roth v. Delano, 338 U. S. 226 ..... 3, 6
S. R. A., Inc. v. Minnesota, 327 U. S. 558 ..... 49, 55, 85, 104, 108, 123, 124

Page

Schaefer v. Woodmere Cemetery, 256 Mich. 332, 239 N. W. 300 50
Smith v. Davis, 323 U. S. 111 85
Thomson v. Union Pacific R. R., 76 U. S. 792 ..... 80, 81, 88, 124
Towne v. Eisner, 245 U. S. 417, 425 72
Union Pacific R. R. v. Peniston, 85 U. S. 787 ..... 80, 84, 88, 124
United States v. Alabama, 313 U. S. 273 ..... 105, 107, 108
United States v. Allegheny County, 322 U. S. 174 ..... 23, 31, 47, 50, 93, 96, 117, 120, 121, 124
United States v. Ansonia Brass & Copper Co., 218 U. S. 452 59
United States v. City and County of San Francisco, 310 U. S. 16 47
United States v. Forbes, 36 F. Supp. 131 47
United States v. Foster, 131 F. 2d 3 96
United States v. Jones, 176 F. 2d 278 47
United States v. Lennox Metal Mfg. Co., 225 Fed. 2d. 302 ..... 65, 66, 67, 76, 125
United States v. Mott, 37 F. 2d 860 47
United States v. State of Arizona, 295 U. S. 174 30
Utah Power & Light Co. v. United States 47
Watson v. Employers Liability Assurance Corp., 348 U. S. 66 ..... 3, 6
West Michigan Lumber Co. v. James Dean, 73 Mich. 459, 41 N. W. 503 99
West v. Oklahoma Tax Comm., 334 U. S. 717 105
Willcuts v. Bunn, 282 U. S. 216 ..... 85, 87
Wisconsin Central Railroad Co. v. Price County, 133 U. S. 496 56

Federal Statutes

	Page
Armed Services Procurement Act of 1947, Ch. 3, C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et seq.	7, 12, 22, 29, 34, 42, 46, 52
Contract Settlement Act of 1944 (78th Congress, 2d Session, Public Law 395, Ch. 358), 41 U. S. C. A. 101	42, 73
First War Powers Act, c. 593, 55 Stat. 838, Sec. 201, 50 U. S. C. 611	34
R. S. Section 3648, amended Aug. 2, 1946, c. 744, 60 Stat. 809, 31 U. S. C. A. Sec. 529	7, 22, 28, 30, 52
Act of Aug. 22, 1911, c. 42, 37 Stat. 32, 34 U. S. C. 582	33
34 U. S. C. A. Sec. 582	33, 34
Act of Oct. 6, 1917, c. 79, 40 Stat. 383, Sec. 5 (note to 31 U. S. C. 529)	33
Act of June 28, 1949, c. 440, 54 Stat. 676, 50 U. S. C. 1151	7, 34
Act of Dec. 18, 1941, c. 593, Title II, 201, 55 Stat. 838, 50 U. S. C. 611	7, 22, 34, 36
Act of June 30, 1949, c. 288, Title III, Sec. 305, 63 Stat. 396, 41 U. S. C. 255	36

Regulations

Army Procurement Regulations, 1947, 12 Federal Register 7693	8, 54
1 CCH Government Contracts Rep., §8017 (No. 7800-1)	72
1 A CCH Government Contracts Rep., §29.753	74
2 CCH Government Contracts Rep., §40.026	73

Local Statutes, Etc.

Compiled Laws, State of Michigan (1948), Sec. 211.1, 211.10, 211.11, 211.40 ..... 8, 10, 95
Local Acts (1943), State of Michigan, Act No. 6, Sec. (1), (2), (4) 8, 10
Charter of the City of Detroit, 1918 (1952 Ed.), Chapter II, Title VI:
Sec. 1 ..... 8, 9, 10, 50, 95, 96
Sec. 2 ..... 8, 101
Sec. 6 8
Sec. 7 ..... 8, 50, 95, 96, 98, 99, 106
Charter of the City of Detroit, 1918 (1952 Ed.), Chapter IV, Title VI:
Sec. 1 ..... 8, 50, 95, 96, 102, 103
Sec. 26 ..... 8, 50, 103
Sec. 27 ..... 8, 50

Congressional Hearings and Other References

2 United States Code, Congressional Service, 80th Congress, Second Session, 1948, Vol. 2, p. 1064 32
Hearings before the Committee on Governmental Operations, United States Senate, 84th Congress, 1st Session, July 24, 1955, Appendix II, p. 200 110
House Armed Services Committee Hearings, Vol. 38, Library of Congress, Vol. 1, pp. 434, 447, 576, 577, 578, 608, 609, 616 ..... 38, 39, 40, 41
No. 911, Senate Misc. Reports IV, U. S. 10546 ..... 35, 54
House Report 1507 35
House Report 109, p. 5, 80th Congress, U. S. 11118 .. 32, 37

Miscellaneous

	Page
29 Amer. Jurisprudence, p. 47	60
42 Amer. Jurisprudence, p. 215	58; 61
Brown on Personal Property, Sec. 5, pp. 6, 7	57
Cooley on Taxation, Vol. 1, 4th Ed., Sec. 24	97
Cooley on Taxation; Vol. 3, 4th Ed., Sec. 1044	97
Letter Order for Supplies (§1307) W. D. Contract Form No. 7	Appendix 18a
Opinion Attorney General of Michigan, 1928-30, p. 176	100, 103
Opinion, Attorney General of Michigan, 1940, p. 524	101
Personal Property Assessment Roll, City of Detroit	Appendix 29a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 18

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Appellee, and THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 36

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Respondent, and THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPELLANTS' BRIEF

[Figures in parentheses refer to pages of the Transcript of Record (Joint Appendix), unless otherwise indicated]

These consolidated cases have been brought up by defendants-appellants' notice of appeal, July 25, 1956, and filing of jurisdictional statement, September 10, 1956, and also by petition for writ of certiorari, filed November 13, 1956.[1]

The Court's order of January 14, 1957, in No. 401 (October Term, 1956) states that consideration of question of jurisdiction was postponed to hearing of these cases on merits. On the same date, appellants' petition for certiorari was granted in No. 563 of the same term. Although bearing two separate docket numbers, they are one and the same case. The question of jurisdiction is discussed at the outset, *infra* pp. 3-7.

OPINIONS BELOW

The opinion of United States Court of Appeals, Sixth Circuit, appears in 234 F. 2d 380. Copies of judgment entered June 16, 1956, and opinion of the Court below have been added to joint appendix (271-277) prepared for that Court and filed herein pursuant to Court Rule 36 (3). The opinion of Hon. Thomas P. Thornton, District Judge for Eastern District of Michigan, is reported in 132 F. Supp. 899 (112-122).

[1] After extension of time granted September 15, 1956 to keep open alternate avenue of review in the event appeal taken might be deemed ineffectual, deferment of action by the Court on queston of jurisdiction caused appellants to file petition for review by certiorari prior to final deadline.

JURISDICTION

(i) These actions were brought and original jurisdiction in the District Court invoked by plaintiff and appellee, Murray, under 28 United States Code, Sections 1331 and 1332, respectively.

(ii) Consolidated herein are two suits brought against Detroit for recovery of first and second half installments of the disputed 1952 City personal property tax together with a third action against the County of Wayne all based on a single assessment and involving the same questions and claim of tax immunity of an independent subcontractor based on contract provisions covering production of parts for use in aircraft contracted to be delivered by intermediary prime contractors to the United States Air Force. They were disposed of together by judgment of the United States Court of Appeals, Sixth Circuit, on June 16, 1956, in Cause No. 12678. Notice of Appeal was filed in that Court in each of the cases on July 25, 1956.[2]

(iii) Jurisdiction of the Supreme Court to review the latter judgment by direct appeal is conferred by C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (2)); C. 646, 62 Stat. 961, as amended by C. 139, §106, 63 Stat. 104 (28 U. S. C. A. 2101(e)).

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review said judgment on direct appeal in this case:

Watson v. Employers Liability Assurance Corporation, 348 U. S. 66.
Roth v. Delano, 338 U. S. 226.

---

[2] The issues raised being identical, this Brief is intended to apply to all three cases in conformance with the Court's Order of Consolidation.

Kennedy v. Mason, 334 U. S. 249.
Longest v. Langford, 274 U. S. 499.

At the very outset, questions of invalidity of State statutes and local charter provisions were raised in the trial court in complaints filed by appellee.

Paragraph seven of said complaints (R. 6) claims the assessment is made upon or with respect to property constitutionally immune. Paragraph eight claims Michigan laws and local (charter provisions) ordinances purporting to authorize such assessment are in violation of and repugnant to the Constitution of the United States. Paragraph nine claims such laws and ordinances have been applied in a manner which renders them invalid under the Constitution of the United States (R. 6).[3]

Such allegations provide the framework on which all issues discussed in briefs and opinions in this case depend. Even though no specific reference is made to them in the Court of Appeals' opinion, there is passing mention that the United States claimed the assessment was upon its property and therefore invalid under the Federal Constitution.

However, affirmance of judgments in the Courts below holding these assessments invalid must have identical legal effect as the final decision in *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110. Opinion of the Court of Appeals herein (R. 275-6), 234 F. 2d 380, 383, characterized the decision in *Kern-Limerick* as follows:

> "The Arkansas gross receipts tax law was held unconstitutional as applied to transactions whereby private contractors procured in Arkansas two trac-

[3] The Murray Complaint was adopted by the United States (R. 76, II).

> tors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract entered into with the Navy Department * * *."

By analogy, application of the same language to the facts at hand produces the following inevitable result:

The Michigan general property tax law and local charter provisions were held unconstitutional as applied to transactions where private contractors were in possession of personal property on hand for processing to be incorporated into aircraft being manufactured for the United States under a cost-plus-fixed-fee prime contract containing partial-payment, title passage clauses on which partial payments had been made prior to effective tax date.

The Courts below thus held Michigan Statutes and local charter provisions, as applied to facts before them, unlawfully interfered with the Federal Constitution. The problem is one of alleged clash between State and federal laws. This is sufficient for appellate jurisdiction of this Court under Section 1254 (2) 28 U. S. C.

Unlawful interference is a holding of invalidity because of repugnancy. Any other view would permit a Court of Appeals to deprive this Court of appellate jurisdiction, when in fact holding a state statute invalid because of repugnancy to a federal law—merely by phrasing the opinion in such a way as not to use the exact words of Section 1254 (2).

> "A statute may be invalid as applied to one state of facts, and yet valid as applied to another."
>
> *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289.

This Court acknowledged jurisdiction by appeal in *Watson v. Employer's Assurance Corporation, supra,* stating at pp. 69-70 (U. S.):

> "With emphasis on the due process contention, the District Court dismissed the case, holding both statutory provisions unconstitutional as to policies written and delivered outside the State of Louisiana, 107 F. Supp. 494. The Court of Appeals agreed with the District Court and affirmed the dismissal, 202 F. 2nd 407. Provisions of Louisiana's statutes having been held invalid as repugnant to the Federal Constitution, the case is properly here on appeal."

Further this Court took jurisdiction where the Court of Appeals held a state statute ineffective as an unlawful interference with the liquidation of a national bank in *Roth v. Delano, supra,* and has accepted for review without commenting thereon similar determinations striking down official acts taken pursuant to State laws as repugnant to the Federal Constitution or laws (*New York v. Latrobe,* 279 U. S. 421; *Madden v. Kentucky,* 309 U. S. 83 and *Ott v. Mississippi Valley Barge Line Co.,* 336 U. S. 169).

It is respectfuly submitted that Section 1254 (2) is complementary to Section 1257 (2). In the first, a party is given authority to appeal from an adverse decision in a United States Court holding a state statute invalid because of repugnancy to the Constitutional treaties or federal law. In the second, a party may appeal from a decision in a state court where a state statute is drawn in question and held valid despite the claim raised that it is repugnant to the Constitution and laws of the United States.

In practice these statutory provisions give to either a State or the United States opportunity to appeal as a matter of right from an adverse decision in the forum of the other when state law and federal Constitution are held in conflict.

In any event should appellant's direct appeal be deemed ineffective, review of the issues raised may be pursued by virtue of the Court's grant of certiorari January 14, 1957 in No. 563, October Term, 1956.

Bradford Electric Light Co. v. Clapper, 284 U. S. 221, 224.

STATUTES INVOLVED

(v) Statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix attached hereto.

Armed Services Procurement Act of 1947, Public Law 413 of 80th Congress, C. 65, 62 Stat. 21 *et seq.*, as amended, 41 U. S. C. A. Sec. 151 *et seq.*

R. S. 3648, 31 U. S. C. A. 529 (as amended August 2, 1946, 60 Stat. 809).

C. 288, Title III, §305, 63 Stat. 396, as amended, 41 U. S. C. A. Sec. 225.

C. 593, 55 Stat. 838, Sec. 201, 50 U. S. C. Append. 1946 ed., Sec. 611.

C. 440, 54 Stat. 676, 50 U. S. C. A. Sec. 1151.

Procurement Regulations, 12 F. R. 7693.

Sec. 211.1 C. L. Mich. 1948.
Sec. 211.10 C. L. Mich. 1948.
Sec. 211.40 C. L. Mich. 1948.
Local Act, Mich. No. 6, 1943, Sections 1, 2 and 4.

Charter of the City of Detroit:

Sec. 1 of Title VI, Chapter II.
Sec. 2 of Title VI, Chapter II.
Sec. 6 of Title VI, Chapter II.
Sec. 7 of Title VI, Chapter II.

Sec. 1 of Title VI, Chapter IV.
Sec. 26 of Title VI, Chapter IV.
Sec. 27 of Title VI, Chapter IV.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Were provisions for transfer of title to United States of materials in possession of an independent subcontractor unauthorized under federal law?

2. If inclusion of title-transfer provisions in appellee's sub-contracts was authorized, did related contract terms and undisputed course of conduct nevertheless establish ownership in appellee and paper title in government?

3. Are these state and local tax laws and non-discriminatory taxes levied thereunder valid inasmuch as no direct burden is imposed on the federal government in violation of its implied constitutional immunity?

The Courts below said "No" to these three questions.

STATEMENT OF CASE

Nature of Assessment and Tax

The assessment on which the tax in question was based covered personal property of appellee valued altogether at $12,183,180 as of January 1, 1952. (Complaint, paragraph 3, R. 4.) Of this, appellee complained that certain items described as belonging to the United States had been included, the value of which was resolved after hearing by Michigan State Tax Commission as being in amount of $2,043,670 (R. 84).[4]

Such items consisted of basic materials purchased from suppliers by appellee, an independent subcontractor, which it was processing for parts and components of aircraft and aircraft engines to be delivered to Kaiser Manufacturing Company and to Curtiss-Wright Corporation, respectively. The latter were prime contractors with the United States Air Force and were engaged in manufacturing airplanes for the United States Air Force (R. 4).

Said total assessment appeared on the 1952 assessment roll as charged to Murray Corporation of America. On the same specific line the assessing officer stamped this notation: "Assessed subject to prior rights of Federal Government" (Appellants' Exhibit 3, R. 103-104).

Said assessment was made under Charter of the City of Detroit (Section 1 of Title VI, Chapter 11) pursuant to authority of General Property Tax Act of Michigan,

---

[4] Not all of the materials being produced or processed for Government use by appellee under its several sub-contracts are included in the amount complained of. Some purchases of materials were made by appellee under other sub-contracts which differed from the Wright and Kaiser sub-contracts in that they did not provide for partial payments and passage of title (R. 96).

Act 206, 1893 (C. L. 1948, 211.1 *et seq.*, M. S. A. 7.1 *et seq.*). The first section of the latter Act reads as follows:

> "That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

In accordance with Section 11 of said Act (M. S. A. 7.11) corporate property is assessed as follows:

> "All corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation. * * *"

In addition the following provision appears in the City Charter of Detroit, adopted June 25, 1918, Title VI, Chapter II, Section 1:

> "Section 1. All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. Assessment shall be made according to assessment districts, the boundary lines of which shall conform to ward boundaries as established from time to time by the common council. There shall be an assessment roll in book form for each such district. All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not."

This is made applicable to the County of Wayne by Local Act No. 6, Mich. 1943, Section 1 of which provides:

> "Sec. 1. That hereafter when the assessment rolls of the different wards in the city of Detroit, for city taxes, are annually, fully and finally confirmed, as prescribed by the provisions of the city charter, it shall be the duty of the board of assessors of said city to make a copy of the assessment roll of each of

said wards, to be known as the state and county tax rolls, * * *."[5]

Following completion of the 1952 assessment rolls, appellee complained in writing to the Detroit Board of Assessors expressing its contention that government owned property had been included in its assessment. Considering itself aggrieved by the assessment and decision of the Board of Assessors appellee took an appeal to the Board of Review. Upon confirmation of the assessment, an appeal was taken to the State Tax Commission which denied same leaving the assessment as shown by Exhibit 3 (R. 103-104).

The City tax bill made out to appellee, based on its total assessment, was paid in two installments to the City Treasurer by appellee—half on August 12, 1952 and the balance on January 15, 1953. The County tax bill, likewise based on the same assessment, was paid to the County Treasurer on January 15, 1953. Accompanying each such payment was a written protest complaining of that portion of the total amount which covered the items claimed to be property of the Government (R. 8).

Form and Provisions of Contracts

Appellee's sub-contract with Kaiser (R. 169) consisted of a letter of intent executed March 23, 1951 for the manufacture of certain parts and sub-assemblies therein specified, amended August 15, 1951 (R. 173) and again on October 4, 1951 (R. 181), under Kaiser's letter Prime Contract No. AF 33(038)-18481 with the United States Government entered into December 20, 1950 and subsequently amended (R. 142-168).

---

[5] Other applicable provisions of the charter appear in appendix to this brief.

Appellee's other sub-contract was with Wright. It was likewise a letter of intent executed April 19, 1951 (R. 216) for the manufacture of certain parts and sub-assemblies therein specified, amended on May 24, 1951 (R. 222) under Wright's Prime Contract No. AF 33(038)-18132 with the United States Government as subsequently re-amended (R. 189-215). The respective prime contracts were entered into as a result of negotiations between the Air Force Contracting Officers and the prime contractors (142) and (190).

Authority is claimed from Section 2 c (1) and (10) Public Law No. 413, 80th Congress, entitled Armed Services Procurement Act of 1947 which may be found in Title 41 U. S. C. A., Section 151 c (1) and (10), (R. 143, 191). Legal authority for inclusion in these contracts of certain provisions for partial payments and title passage and construction thereof in the light of companion provisions is one of the questions to be resolved in this case.

The letter prime contract between Wright and the latter referred to a so-called Basic Agreement No. 1 and made it a part of the contract between them (Stipulation No. 1 (9), R. 84). Superseding definitive sub-contracts and prime contracts were not agreed upon nor made effective until after the assessment date herein.

Analysis of Partial Payment Provisions

Applicable provisions authorizing making of partial payments to appellee upon property acquired or produced by it for performance of its sub-contracts were incorporated by addition of a new paragraph 11 (Exhibit 2 B). It begins with Subdivision (a) of said paragraph (R. 174-5).

Subdivision (b) provided that upon the making of any partial payment under the contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by appellee for the performance of the contract, and properly chargeable thereto under sound accounting practice, should forthwith vest in the Government; and title to all like property thereafter acquired or produced by appellee for performance of the contract and properly chargeable thereto as aforesaid should vest in the Government forthwith upon such acquisition or production.

Both sub-contracts contained a number of reservations in sub-paragraphs (d), (e) and (f) immediately following the partial payment-title passage clause. Notably, the right to acquire or dispose of property upon terms approved by the Contracting Officer was reserved in the subcontractor (Murray) both before and after termination at the option of the Government (Exhibit 2B, 11(d), R. 176). After termination further provisions under the termination article controlled. Accordingly production scrap could be sold by the sub-contractor prior to termination without approval of the Contracting Officer.

The proceeds in either case were to be paid or credited to the Government as the Contracting Officer might direct where not exceeding the balance of any partial payments (Exhibit 2B, 11(d), R. 176).

Upon liquidation of all partial payments received by the sub-contractor (Murray) or upon completion of deliveries called for by the contract, title vested in the latter to all property (or proceeds thereof) not delivered to and accepted by the Government under said contract or not incorporated in supplies delivered and accepted and to which title vested in the Government under the partial payment provisions (Exhibit 2B, 11(d), R. 176).

Further, property to which the Government acquired title by virtue of said provisions was nevertheless excepted from effect of contract article entitled "Liability for Government Furnished Property". The sub-contractor was not relieved from risk of loss or destruction of or damage to property to which title vested in the Government under the partial payment-title passage clause (Exhibit 2B, 11 (e), R. 177).

Moreover, advance payment provisions included in the contract stipulated that at any time that partial payments might be made to the sub-contractor (Murray) under the partial payment article if there should remain an unliquidated balance outstanding of advance payments, then the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment would be required to be deposited in the special bank account or accounts maintained as required by the advance payment article and withdrawn pursuant to its provisions (Exhibit 2B, 11(f), R. 177).

References made herein to contract terms are directed to the Kaiser-Murray sub-contract. The same terms were incorporated by amendment of Kaiser prime contract (Exhibit 1, Amend. No. 4 (2b), R. 161-2).

Substantially similar terms were made part of the Wright-Murray sub-contract (Exhibit 5A, (5), R. 219) and Wright prime contract (Exhibit 4, Amend. No. 2 (2c), R. 202) and (Exhibit B, R. 204).

Requests for such reimbursement (partial payments) were made by plaintiff[6] to the respective Prime Con-

---

[6] To Kaiser—Aug. 10, 1951, Sept. 21, 1951, Oct. 24, 1951, Dec. 10, 1951 and Dec. 20, 1951.

To Wright—Oct. 30, 1951, Dec. 6, 1951.

tractors (R. 236-255) and payments were thereafter accordingly received from Kaiser in the aggregate amount of $163,949.20 on October 12, 1951 (R. 258) and from Wright in the amount of $510,827.67 on December 31, 1951 (R. 259-261).

Proceedings in District Court

The United States was permitted to intervene on its petition for leave (R. 79).

On March 11, 1954 the consolidated action was heard and submitted before Hon. Thomas P. Thornton, District Judge (R. 104-111) on appellee's motion for summary judgment filed January 6, 1954 (R. 38-75).

Between these two dates depositions were taken at appellants' request, records of appellee Murray were examined and stipulations were prepared, executed and filed to the end that the matter could be submitted to the Court upon undisputed facts for his determination as a matter of law based upon the pleadings, stipulations, depositions and exhibits (R. 82-104).

Stipulated Facts

Out of these extensive depositions, four stipulations were entered into, presenting factual elements of the case for consideration by the Trial Judge. Highlights of these stipulations indicate the following:

Tools already owned and furnished by the United States Government to appellee Murray under a separate facilities contract were not assessed and therefore are not involved in this dispute (Stipulation No. 1-(3), R. 82).

Tools built and completed by Murray under its subcontracts on which there had been inspection at the plant

prior to January 1, 1952 for use there in performance of said sub-contract were not included in the assessments.

No supplies or sub-assemblies (end products made by appellee) had been completed, inspected or delivered to either of the Prime Contractors by appellee under said letter sub-contracts prior to January 1, 1952 and all materials, supplies and such uncompleted items as were on hand on assessment day were included in the assessment being challenged (Stipulation No. 1 (5), R. 83).

Murray was sole beneficiary under its insurance policies in force on January 1, 1952 on all real and personal property * * * all while located in and/or on the premises occupied by the insured. No interest of any other claimant is noted, not even of the Federal Government (Stipulation 1 (6), R. 83).

All auditing of appellee's books, controls, inspection and participation in its negotiations with the Prime Contractors (Kaiser and Wright) was for the purpose of effecting clearances for said Prime Contractors with the Air Force under their prime contracts. This applied, of course, insofar as appellee's goods and payments received from the Prime Contractors were elements of cost to be cleared by the Air Force when billed therefor by the Prime Contractors (Stipulation No. 2 (4c), R. 87).

Otherwise the Air Force had no direct supervision over the sub-contractor with regard to the latter's costs (Stipulation No. 2 (4d), ibid).

Stipulation No. 4 (R. 94-101) was based exclusively on the deposition testimony of Mark I. Sammon, Assistant Treasurer of the taxpayer whose affidavit was filed earlier in support of appellee's Motion for Summary Judgment.

From such depositions it appeared that an analysis of costs bearing on appellee's request for partial payments included:

(a) Liaison work, machinery movement, time study, tool engineering, plant layout, planning and scheduling, engineering of portable tools, repair and maintenance of motors, engineering records, crib attendants, templates, traveling expenses, depreciation and taxes, and blueprints.

(b) Tooling costs,—which at the beginning were greater than production costs. As Murray progressed, however, production costs by far exceeded tooling.

(c) Costs for certain intangible items in make-ready preparation were used as an element of costs for purpose of its requested partial payments here involved. However, these intangible items were excluded from the assessment figure which was based only on raw materials, tooling, in-process inventory and unbilled shipments, pertaining to the sub-contracts here involved and which were on hand on January 1, 1952 (Exhibit A attached to complaint (R. 8-11)) (Stipulation No. 4 (3), R. 94).

It further appeared that no notice was given to creditors of the taxpayer of the claimed passage of title to the United States after making the first partial payment. No written documents of conveyance covering the said personalty were executed and delivered by appellee to the United States or to the Prime Contractors nor were any deliveries made prior to January 1, 1952 (Stipulation No. 4 (5), (6), R. 95).

Further it appeared that no change was made by appellee in its accounting procedure or methods pertaining to said personalty after receipt of a partial payment than

were in effect before. Included in its Acct. No. 1280 in which the subject property was accounted for, appellee commingled a record of materials purchased on other defense contracts unrelated to the claim of title in the Government, no provision for partial payment and transfer of title being present therein (Stipulation No. 4 (7), R. 96).

As shown (in the unnumbered paragraph at top of p. 97) appellee's annual report published under date of August 31, 1951 made no specific reference to any sum of $125,000 as a segregated account receivable. This figure represents the total of two items submitted by appellee for partial payment, requested before, although not received until after, said August 31, 1951.

The following year appellee labelled its situation relating to the matter of Government Contracts as: "Total Recoverable Amounts Applicable To Government Contracts" (Stipulation No. 4 (7), R. 97).

It further appeared that there was no different physical action or treatment in handling or dealing with the property in question after receipt of partial payments than before (Stipulation No. 4 (8), R. 98).

It further appeared that responsibility for determining whether rejected items should be worked over was left to appellee's employees. This was distinguished from scrap generated in the performance of the contract.

Even if spoiled work was re-worked and eventually scrapped the cost thereof would all be included as part of appellee's cost of other items eventually produced and delivered under the sub-contract.

Where scrap of any kind was disposed of, the proceeds received by appellee to the extent that same did not ex-

ceed the unliquidated balance of the partial payments were paid or credited to the Government as the contracting officer directed (Stipulation No. 4 (11, 12), R. 98).

It further appeared that appellee had not billed nor had it been directly paid or reimbursed for the specific amount of 1952 personal property taxes herein involved. Nevertheless it did include the amount of taxes paid by it as an element of burden in computing costs submitted for forward price redetermination and retrospectively as to goods completed and delivered prior to the date of the first price redetermination (Stipulation No. 4 (13), R. 99). Such redeterminated prices were negotiated between appellee and its respective Prime Contractors (Stipulation No. 4 (13), R. 99).

In the same way the Prime Contractors included redetermined prices (which involved negotiating on all cost items of which taxes were but one of many) to the extent paid as part of their costs submitted to the United States Air Force (See also Stipulation No. 2 (5), R. 87).

In this connection the following appears in the deposition[7] of Mark I. Sammon, Assistant Treasurer of appellee:

> "We have collected—I can't say we have collected all of it (1952 taxes) and I can't say we haven't. As it would enter the inventory if the inventory were completely liquidated, yes. If the inventory as it is were not completely liquidated, I don't know what portion would be left." (Deposition Transcript p. 108.)

---

[7] The deposition transcript with attached exhibits referred to has not been printed due to its great length but has been filed with the Court below pursuant to Order dated December 2, 1955 (R. 139).

It was stated that under certain circumstances there was a definite possibility that the taxes here sought to be recovered would not be refunded to the Prime Contractors at all by appellee. This would follow as a result of such renegotiation if Murray's profits on these defense contracts on an over-all company-wide basis were not found excessive (Final sub-paragraph of Stipulation No. 4 (13), R. 99-100).

Shipments of materials and products called for by its sub-contract with Wright were made to the latter's plant in New Jersey. Documents accompanying such shipments were of the usual type of bill of lading and invoice exemplified by Deposition Exhibits 3 and 4 (R. 100). (See reference, *supra*, to footnote 3.)

No bills of lading were used on shipments to Kaiser, same being made by appellee's trucks to the Willow Run Plant (Stipulation No. 4 (14), R. 100).

Such property was identifiable prior to January 1, 1952 by tagging, labeling or by segregation, all according to such letter sub-contract by number and description. Also it was segregated from other personal property owned and used by appellee in connection with its automotive and other operations.

Appellee's aircraft operations were separated from its automotive and other operations and under the supervision of a separate division manager and supervisory staff (Stipulation No. 4 (8), R. 97).

The agreed upon dollar valuation of personal property here assessed is $2,043,670.00. The claim of appellee against appellant City is in the sum of $67,714.96 and against appellant County in the sum of $12,572.66, exclusive of interest from the date same was paid under protest prior to commencement of the several actions herein (Stipulation No. 1 (8), R. 84).

After hearing of oral arguments on the Motion for Summary Judgment (R. 104-111) on March 11, 1954 and taking the matter under advisement on briefs filed, the District Judge filed his written opinion thereon on June 23, 1955 (R. 112-122).

An Order granting appellee's Motion for Summary Judgment was accordingly signed on June 29, 1955. On the same day judgments were entered against the City of Detroit in Action 12108 in the total sums claimed together with interest or $38,733.97 and in Action 12482 in the total sum claimed together with interest or $38,014.50; and against the County of Wayne in Action 12483 in the total sum claimed together with interest or $14,116.30.

Notices of Appeal therefrom were filed by the respective appellants and Orders Staying Proceedings entered upon filing Supersedeas Bonds on July 27, 1955.

Said appeals were consolidated and argued before the Court of Appeals, Sixth Circuit, on June 4, 1956 (R. 271). The judgments were affirmed on June 16, 1956 pursuant to opinion of the Court (R. 271-277). An Order Staying Mandate was entered July 13, 1956 (R. 277) and extended August 10, 1956 (R. 278).

Notices of Appeal to the Supreme Court were filed July 25, 1956 and the consolidated cause docketed on September 10, 1956 (R. 278-283).

In the meantime a petition for certiorari was filed which was granted (R. 284) on the same day (January 14, 1957) as the Court entered an Order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 284).

SUMMARY OF ARGUMENT

i

Inclusion of partial payment-title passage provisions in the sub-contracts entered into by appellee with Kaiser-Frazer Corporation and Wright Aeronautical Corporation, prime contractors with the United States Air Force, were not authorized by and were impliedly prohibited by Congress. Payments in excess of value of articles delivered were prohibited by 31 U. S. C. 529, except as Congress otherwise directs.

The prime contracts underlying appellee's sub-contracts were entered into on authority claimed from Armed Services Procurement Act of 1947, 41 U. S. C. 151, which made no mention of partial payments or passing title. Sec. 611 of 50 U. S. C. which does authorize partial payments was not claimed as authority by either appellee or the Government. Sole provision for payments in the Procurement Act are found in Sec. 5 in the form of advance payments with security in the form of a lien for protection of the Government.

The Procurement Act of 1947 under which these prime contracts were negotiated departs from usual advertising and sealed bid methods. Specific conformance with its provisions was mandatory. No authority to include another provision for payment may be implied save in the form prescribed by Sec. 5.

Legislative enactments in the past dealing with partial and advance-payments never required more than security in the form of a paramount lien for the Government's protection. Failure to even mention partial payments or title passing provisions or include them in sample forms of contracts exhibited before Committees of Congress con-

sidering H. R. 1366, adopted as Armed Services Procurement Act, negatives any implication that procurement officers were intended to have the broad powers urged by appellee and the Government herein.

Contrary to conclusions of Court below, distinctions in this case patently set it apart from *United States of America v. County of Allegheny*, 322 U. S. 174. Authority of procurement officers are challenged here and none of the personal property completed, accepted and paid for by the Government in appellee's possession on tax day was included in the assessment in question as it was in Allegheny. Further the Government's interests have been protected by noting on the roll that the assessment to appellee was "subject to prior rights of Federal Government" and finally both by local law and in practice the assessment was *in personam* and not *in rem* as in Allegheny.

ii

For the purpose of the second section, appellants assume that the partial payment-title vesting clause of Murray's subcontract was authorized and effective to vest some type of interest in the Government.

The substantive approach of the Court in tax problems, which disregards formalisms and considers all the circumstances of each case, requires a consideration of these important factors in the instant matter: (1) The related contractual provisions, (2) the conduct of the parties with reference thereto, and (3) other related procurement regulations.

We contend that the following provisions are inconsistent with the claim of ownership in the Government and substantiate our claim that the Government's interest was merely a security or paper title to secure its advances

to appellee: The subcontract does not relieve Murray from risk of loss or destruction of the property; for all practical purposes Murray had the right to acquire and dispose of all property and to determine what parts of the property constitute scrap and to dispose of same to its own advantage. Title to all materials and work in process in its hands would vest in Murray upon liquidation of all partial payments. Hence, the Government's interest, once divested upon liquidation, could only be revived upon further partial payment.

Murray's actions, as hereinafter fully outlined, were likewise inconsistent with the theory of title-transfer to the Government, and the Government fully acquiesced in Murray's actions.

Army Regulations treat partial payments as a method of financing for contractors. They also except as Government property materials subject to partial payment provisions. An interpretation of the partial payment-title vesting clause, in the light of these Regulations, as vesting a beneficial title in the Government requires a strained and unrealistic construction and gives to the Government a type of interest which we believe neither Congress nor the contracting parties ever intended it to have. When, however, the clause is read together wtih related provisions of the subcontract and in the light of applicable procurement regulations, and is considered in connection with the conduct of the parties in relation to the contract, we earnestly contend that the clause must then be construed as granting to the Government a lien to protect its advances to assist in the financing of the contract. Only under such an interpretation does the clause become meaningful and in harmony with the conduct of the parties and with the applicable procurement regulations.

The facts and law in this case are in harmony with correct principles of the implied governmental immunity doctrine as established by this Court and these taxes are valid thereunder. Said taxes are not taxation of the means employed by the Federal Government for the execution of its powers nor do they retard, impede, burden (except possibly economically) or in any manner control the operations—of the general government for the reason that the incidence of these taxes is not against the Government, its instrumentalities or its property and, therefore, they constitute no direct burden against the United States under this Court's decisions.

The tax laws involved, as they are here administered and interpreted, fix the liability and responsibility for the payment of these taxes and make them a charge against appellee personally. They may be collected from appellee both by suit against the corporation for collection of debt and by seizure of the corporation's property other than the property here claimed to be owned by the United States. These tax laws, so interpreted by the Michigan Supreme Court, determine the incidence of the tax against the person named on the assessment roll, appellee herein, there being no question as to the identity of the taxpayer (Murray) under the terms of these contracts, and those findings are conclusive upon this Court.

Whatever interest the Government has in the materials used by appellee in the performance of its subcontract to a Government prime contractor is protected by subjecting the assessment to prior rights of the Government and by decisions of this Court holding that neither the Government nor its property may be subjected to any action or proceedings for collection of the tax.

There can be no distinction between *ad valorem* property taxes of this character and privilege, excise or other taxes under the immunity doctrine when an independent contractor bears the full impact of the taxes equally in each case and the Government and its property is equally free from destruction or interference in each instance. The substance and effect of the tax, not its name, is controlling in the determination of this Court as to whether it is a tax upon the means of government operations or any attempt to impede, retard, burden or control Government operations.

The traditional immunity of the Federal Government and its property should be distinguished from attempts to create immunity by ingenious contract words having no substantial relation to the protection of the sovereign from hostile action of the States but devised mostly for the Government's or a contractor's specific economic benefit.

The materials acquired or produced by appellee here claimed to be owned by the Government were never purchased by the Government under these contracts as materials nor was it so intended there not even being any privity of contract between appellee and the Government. The prime contracts were solely for the purchase of completed and inspected planes, engines, assemblies and parts and hence materials, whether in the hands of prime contractors or appellee, were never intended as "means of Government operation";—only the final delivered assemblies, parts, planes and engines being in that category.

These partial payment-title transfer clauses create situations in which some Government contractors must pay personal property taxes according to the full value of all materials in their possession (having made no request for partial payments) while other contractor's materials are immunized because they requested and received a partial

payment. The local community, therefore, may be reimbursed by one contractor for his share of the costs of local police, fire, health and other service and not by the other. It is inconsistent that similar materials being processed by contractors for eventual delivery of identical products to the Government should be labeled as means of Government operation in the one case but not in the other. This is an anomaly that cannot withstand the tests laid down by the Court to determine true immunity because the creation of such immunity is left entirely to the financial needs or whims of a private contractor.

Inasmuch as there is no direct burden laid upon the Government and there is only a remote (economic), if any, influence upon the exercise of functions of Government in the imposition of these taxes; and there is no attempt to destroy, hamper or control the Government or its contractors in carrying out these contracts, there is no discrimination against or interference with the Government's operations, these taxes should be held valid under principles of implied immunity heretofore proclaimed by this Court.

ARGUMENT

I.

WERE PROVISIONS FOR TRANSFER OF TITLE TO UNITED STATES OF MATERIALS IN POSSESSION OF AN INDEPENDENT SUB-CONTRACTOR UNAUTHORIZED UNDER FEDERAL LAW?

The Lower Court answered "No."
Appellants contend the answer should be "Yes."

Appellee Murray asks this Court to uphold immunity from a non-discriminatory personal property tax assessed to it upon and according to the valuation of personal property in its possession on January 1, 1952, which it acquired and was fabricating for profit as an independent sub-contractor. It seeks to avoid its proportionate share of heavily increased burdens of the City and County in furnishing service and protection to its citizens including appellee.

Appellants contend that such claim of derivative immunity is not authorized by and is contrary to the express policy of Congress.

Congress has spoken through two statutes. Both applicable statutory provisions are relatively new either by recent amendment or by original enactment. These must be studied for changes, if any, and implications naturally flowing from such changes.

First, *Title 31 U. S. C. A., Sec. 529* as amended August 2, 1946, (formerly R. S. 3648), is a definitive statute with respect to advancement of public moneys:

> "No advance of public money shall be made in any case unless authorized by the appropriation con-

> cerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *"

This we contend defines and limits the powers of government officers in such matters, except as Congress otherwise directs.

The other applicable statutory provision is *62 Stat. 21, Ch. 65 Public Law 413 (80th Congress), Title 41, U. S. C. A., Sec. 151 et seq.*, the *Armed Services Procurement Act of 1947* (Appendix 1a). Authorization for advance payments may be found here—no mention being made of partial payments.

From the latter statute, appellee claimed authority for inclusion of the controversial partial payment and title passage clause, *not as an express but as an implied power.* Appellants submit that none being expressed save in the form spelled out by *Section 5* thereof, applicable to cases of negotiated contracts such as we have here, no such authority may be implied.

It was said in *Clifford F. MacEvoy Company v. United States of America*, 322 U. S. 102, at page 407 U. S.:

> "However inclusive may be the general language of a statute it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which might otherwise be controlling.' *D. Ginsberg and Sons v. Popkin*, 285 U. S. 204, 208, 76 L. Ed. 704, 708, 52 S. Ct. 322, 19 Am. Bankr. Rep. (N. S.) 589."

Neither can it be claimed nor had appellee asserted that the *Armed Services Procurement Act* was intended to re-

peal the provisions of *Section 529, as amended, supra.* It is appellants' position that the *Armed Services Procurement Act* wherever applicable must be read in the light of and in such a manner so as to work in harmony with the former.

A statute must be so construed so that its provisions will not impair the operation of other laws which it is not reasonable to suppose the legislature intended to repeal. *Mills v. Scott*, 99 U. S. 25.

In a somewhat similiar situation a test was made of authority of government officials claimed to flow from statutes there involved. The United States in an original suit brought against State of Arizona (*United States v. Arizona*, 295 U. S. 174), had sought to enjoin interference with the construction by the United States of a dam in the Colorado River. The Supreme Court dismissed the complaint as failing to show construction of the dam was authorized.

This Court's opinion in Arizona indicates that the facts alleged did not show necessary prior approval "by direct order of the President" as required by Section 4 of Act of June 25, 1910, U. S. C. A. Title 43, Sec. 413.

Plaintiff there urged such approval had been given through executive action under the National Industrial Recovery Act. It relied on Sections 201a, 202 and 203 of the Act and Executive Order No. 6252.

The opinion states at page 188 U. S.:

> "We find nothing in the Recovery Act that reasonably may be held to repeal the requirement of that section. It follows that the construction of the dam has not been authorized as required by the Reclamation Law."

And further on the subject at page 191, *ibid.*:

> "As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown. *U. S. v. Jefferson Electric Gas Co.*, 291 U. S. 386, 396, 78 L. Ed. 859, 868, 54 S. Ct. 443. In the light of that rule it is clear the general language of the Recovery Act on which plaintiff relies does not evidence intention on the part of Congress to change its well established policy."

Another parallel to our situation here appears in the *Arizona case, supra.*

In support of the construction for which it contended there, the United States asserted that it was under the Reclamation Laws (Section 25 of the Act of April 21, 1904, 33 Stat. at L. 224, Ch. 1402) that the Secretary of the Interior built the Laguna Dam across the Colorado. The opinion disposes of this by stating at page 186 of 295 U. S.:

> "But it does not appear that either riparian State objected or that the validity of his authority has ever been drawn in question."

This view coincides with our position that the *Mesta* case (*U. S. of America v. County of Allegheny*, 322 U. S. 174) is not applicable to the facts here before the Court. Mr. Justice Jackson similarly commented on the failure to question adequate Congressional authority at p. 182:

> "* * * In this case *no contention is made that the contract with Mesta is not fully authorized by the congressional power* to raise and support armies *and by adequate congressional authorization* to the con-

tracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statutes." (Emphasis supplied.)

In this action we have and do raise the issue of authority.

No Authority for Partial Payments in Connection With Negotiated Contracts

Neither authority for nor express prohibition against partial payments appears in the *Armed Services Procurement Act of 1947, supra.* Our position that contracts pursuant thereto required conformance with its specific directions is warranted in view of authorized departure from usual advertising and sealed bid methods employed in the letting of contracts by the War and Navy Departments.* The bill (H. R. 1366, 80th Congress) when introduced by the Committee to the House of Representatives was characterized as containing safeguards designed to prevent abuses and "narrowed the circumstances in which contracts may be negotiated and has taken further steps to protect the interests of small business" (*cp. 5 House Report 109, 80th Congress, U. S. 11118*). (An edited version of same appears in *Vol. 2 United States Code Congressional Service, 80th Congress, Second Session, 1948*, at pp. 1048, 1064.)

Appellants accordingly submit that it was the Congressional intent to prescribe definite limits in the case of negotiated contracts. It may not logically be urged that former practices, or implications, may enter into negotiated terms in the face of specific, expressed provisions. The following support for appellants' position comes from re-

*Sec. (151c), Appendix 1a.

view of (a) prior legislation, (b) views expressed in the Armed Services Committee and (c) applicable decisions of the Courts.

A. Congressional View of Advance-Partial Payments

Legislative history of payment in advance for services to be performed or articles delivered for the use of the United States reveals invariably that such provisions were treated as an exception and sometimes for limited periods and not as a general method of operating.

Such statutory restriction has been the Government policy during all of World War II. Even prior thereto in dealing with partial payments on work for Navy contracts we find (*Title 34 U. S. C. A., Section 582**) that partial payments shall not be made "in excess of the value of work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made: * * *." In much the same manner an Act of October 6, 1917, c. 79, Sec. 5 (40 Stat. 383) authorized the Secretaries of War and the Navy, *during the then existing emergency*, to make advance payments from available appropriations to contractors for supplies for their respective departments. (Note to Title 31, U. S. C. A., Sec. 529.)

**"The Secretary of the Navy is authorized, in his discretion, *to make partial payments from time to time during the progress of the work under all contracts made under the Navy Department for public purposes, but not in excess of the value of work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made:* Provided, that partial payments shall not be made under such contracts except where stipulated for, and then only in accordance with contract provisions. (Aug. 22, 1911, c. 42, 37 Stat. 32.)"

Again during World War II the matter of partial payments and the question of adequate security in Government procurement contracts was carefuly enacted in *Title 50 U. S. C. A., Section 1151.* This provided for advance and partial payments of defense contracts and a lien for partial payments. The advance payments were limited not to exceed 30 per cent of the contract price and adequate security for the protection of the Government for the payments so made was required.*

It may be noted that *Section 1151*, applicable to war defense contracts in the Second World War, expressly provided for the same lien as contained in Navy contracts *(34 U. S. C. A., Section 582 set forth above)* when partial payments were made.

The policy set forth in *Section 1151* is continued by *Section 611 of Title 50* during the present emergency and by Sec. 5 of *Armed Services Procurement Act of 1947, 62 Stat. 21, Ch. 65 Public Law 413 (80th Congress) Title 41 U. S. C. A., Section 154(a) and (b).* (Appendix 2a, 3a.)

Although 50 U. S. C. 611 were enacted as an emergency measure December 18, 1941, c. 593, Title II 201, 55 Stat.

---

* "Whenever in the opinion of the President of the United States such course would be in the best interests of national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy, or the Secretary of the Treasury in the case of Coast Guard contracts, is authorized to advance, from appropriations available therefor, payments to contractors in amounts not exceeding 30 per centum of the contract price, upon such terms as such Secretary shall prescribe, and adequate security for the protection of the Government for the payments so made shall be required. The Secretary concerned is further authorized in his discretion to make partial payments on the balance of the contract price from time to time during the progress of the work, such partial payments not to exceed the value of the work already done, but to be subject to a lien as provided by the Act of August 22, 1911 (37 Stat. 32; 34 U. S. C., §582), entitled 'An Act authorizing the Secretary of the Navy to make partial payments for work already done under public contracts': * * *." (June 28, 1946, c. 440, 54 Stat. 676.)

839, it was reactivated several times by Congressional amendment until 1956. So it was in effect at the time the contracts involved here were made.

Under said Act the President was authorized by Executive Order to enter into contracts without competitive bidding in those cases where bidding was still required; to enter into contracts without performance bonds; to amend or modify contracts; and to make progress payments on contracts. In reporting H. R. 6233, 77th Congress to the House, the Committee on the Judiciary offered this explanation (Report No. 1507 II, House Misc. Reports VII, U. S. 10558):

> "One of the objectives of this provision is to facilitate the letting of defense contracts to small businessmen who in many cases cannot make the goods at as low a price as the big corporations, who are often not in a position to furnish performance bonds and who need progress payments."

Both House Report 1507 and Senate Report 911 dealing with the same matter, which was adopted as 611, had attached thereto an appendix which concludes with the following:

> "III. Provisions concerning Advance and Partial Payments.
>
> A. 31 United States Code, Section 529, is a general prohibition against paying for any government purchase before delivery or before title is taken to it.
>
> B. Statutes presently giving some, but inadequate relief against these provisions:
>
> 34 United States Code: Section 582.
> Seventy-sixth Congress: Public, Nos. 671, 703."

We submit this illustrates that were there unquestioned authority for the use of partial payment-title passage

clauses as urged, Congress would not be asked by the defense departments for statutory relief.

Furthermore, authority for partial payments to be included in procurement contracts existed by virtue of 611 and Executive Order 10210 (February 2, 1951, 16 F. R. 1049). Nothing therein suggests passage of title, however, and appellees and the Government apparently saw fit not to use such authority but negotiated these contracts with Kaiser and Wright pursuant to the Armed Service Procurement Act and their assumed authority.

Similarly, in setting up *Procurement Procedures* for the government's general services by adoption of *Title 41 U. S. C. A., Section 255*, Congress provided in identical terms the provisions for a paramount lien in the case of advance payments as set forth in *Section 5* of the Armed Services Procurement Act of 1947. (Appendix 3a.)

Nowhere in any of the preceding statutes which confer these express powers on the Armed Services in procurement contracts do we find any statutory provision authorizing vesting of title to any of the materials acquired or work in process. The statutes provide for a paramount lien only, and that lien alone is deemed by Congress adequate to the protection of the Government.

The imposition of such paramount lien to the extent the materials are paid for is not exclusive of an inferior State tax lien. On the contrary these Congressional enactments are carefully drawn so that benefit of the lien shall accrue to the Government only and not to private persons, no matter how closely associated that private person may be to the Government contract.

The legal title theory is the creation of Government lawyers, blandly over-reaching their procurement powers as limited by Congress; *the title adds nothing to the Gov-*

ernment's security that the paramount lien does not provide. Appellee was charged with notice of limitations of authority in procurement officers. It must prove its right to exemption and cannot rely upon the *ipsi dixit* of procurement officers and its own counsel,—transcending the powers of Congress and nullifying the 10th Amendment for the benefit of appellee.

Congress omitted mentioning partial payments or passage of title in the 1947 Act.[5] Neither was Congressional intent expressed therein as to the meaning of the term "type of contract." Accordingly the Court should examine into the Act's Congressional history for assistance to determine reason, if any, for such omissions from an act intended to replace earlier emergency legislation and provide uniform procurement procedures for all the armed services.

B. Congressional Intent in Considering H. R. 1366 (Armed Services Procurement Act).

Appellants submit that entering into "any type of contract" did not imply the right to use "any type of clause" particularly where all mention of partial payments was omitted from a statute intended to codify earlier procurement laws.

For light on intent of Congress regarding types of contracts which could be entered into, we refer to pertinent portions of committee hearings prior to adoption of the *Armed Services Procurement Act of 1947* on which the subject prime contracts are founded. At p. 5 of *House Report 109* on the pending legislation (*H. R. 1366 (80th Congress, U. S. 1118)*) we note the following:

> "The bill provides that certain determinations and decisions shall be final. It also sweeps away many archaic, conflicting and unnecessary laws."

While this Act retained the time-tested method of competitive bidding, considerable latitude was given procurement officers to negotiate contracts with suppliers,—under conditions plainly spelled out. Appellants submit it must have been intended that permission for any phase of these negotiated contracts should strictly conform with its terms.

Significantly, provisions for financing of suppliers in such a negotiated contract were narrowed to the use of Advance Payments (Sec. 5),—in a much broader form however than those exceptions found in Sec. 529 *(supra)* to the prohibition against advance payments. Where express direction is given to use a particular method of financing, it is submitted none other may be implied.

We believe this is what the Committee must have had in mind when its report to the House of Representatives, *supra,* stated:

> "The Committee has assured itself of the necessity for the restricted authorization of negotiated purchasing which the bill contains, and that the bill as amended embodies the most desirable combination of this procedure and that of competitive bidding."

We offer further the following documentation as support of our claim of Congressional intent. The spirit and scope of the proposed bill were presented in a prepared statement by Kenneth Royall, Under Secretary of War, to said Armed Services Committee of the House in February 1947 *(Vol. 38, House Armed Service Committee Hearings on H. R. 1366 (80th Congress) Library of Congress, Vol. 1, p. 434)*:

> "During that (emergency) period, a continuous study was made of Army and Navy procurement, and on the basis of this study, the two services are convinced not only that there should be additional

> exceptions to the advertisement and sealed-bid rule, but also that there should be a whole new procurement philosophy, that of contract by negotiation in certain well defined classes of procurement where the national defense or sound business judgment dictates that such action be taken. This bill, however, would still not give as broad powers as those now available to the Army and Navy under the First War Powers Act. Nor would it go nearly so far as normal commercial business practices. * * *"*

When pressed by the Committee concerning types of contracts contemplated under *Section 4 of the Bill*, James T. Hill, who accompanied Honorable W. John Kenny, Assistant Secretary of the Navy before the House Committee, placed on the record at p. 577 of said Hearings *(supra)* this statement:

> "The following are some of the types of contracts currently being used by the Navy Department the use of which would continue to be authorized under this Bill:"

Listed thereunder at pp. 577-578 *(supra)* are definitions of the following:

(1) Fixed Price Contract with Price Redetermination.

(2) Incentive Contract.

(3) Cost-Plus-Fixed-Fee-Contract.

---

*This statement leaves unsupported the statement appearing in the opinion in *Kern-Limerick, Inc. and United States of America v. Scurlock*, 347 U. S. 110, 116:

> "* * * Under such a provision, it seems that the determination to use purchasing agents is permissible. Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices * * *."

(4) Cost (without fee) Contract.

(5) Letter of Intent.

Earlier at p. 576 *(supra)* we note this exchange:

> "Mr. Brown: Section 4, subsection (a): Except as provided in section (b) of this section 4, contracts negotiated pursuant to section 1 may be of any type which in the opinion of the agency head will promote the best interests of the Government.
>
> Mr. Anderson: Without objection, subsection (a) of section 4 is approved as read.
>
> Mr. Cole: What does that mean, that a contract may be of any type?
>
> Mr. Hill: Prior to the war, the type of contract which was generally used was a lump-sum or fixed-price type of contract.
>
> During the period of the war, it was discovered that other types of contractual arrangements could be contrived which conferred benefits on the Government. I have reference to cost-plus-fixed-fee contracts, cost-with-a-predetermined overhead contracts, time-and-material contracts, so-called incentive-type contracts, and this is intended merely to state that when you get into the field of negotiated contracts, the agencies are free to make that deal which they regard as the best deal from the standpoint of the Government."

This supports appellants' view that use of the word "type" in *Section 4 of the Act* does not go so far as to include "any type of contract clause" such as an attempt to pass title on receipt of a partial payment.

At p. 447 in answer to questions by Committee members:

> "Mr. Anderson: Do you have any further questions, Mr. Philbin?
>
> Mr. Philbin: Yes.

One of the purposes of this legislation at this time is to carry out the peacetime purposes of the Army and Navy, that is, the procurement agencies of the two departments, with certain powers that you had under the First War Powers Act.

Mr. Royall: That is right.

Mr. Philbin: In these areas defined by the bill.

Mr. Royall: Yes, sir. This bill is not as broad as the First War Powers Act, nor is it as broad as the power that a head of a company would have in his own contracting, but it is broader than we had before the war. It is intermediate between the two.

Mr. Philbin: You feel from your war experience that certain of these powers are desirable?

Mr. Royall: Yes, sir. We have had so many contracts and so many situations, and this is the result."

Examination of record and briefs filed in the Supreme Court in *Kern-Limerick Inc. and United States of America v. Scurlock*, 347 U. S. 110, fails to disclose any reference to these *Reports of the Committee Hearings* to aid the Court. Appellants are inclined to the belief that had this Court had before it reports of said hearings, the majority opinion would have been otherwise in *Kern-Limerick*. (See p. 38 *supra*.)

The Committee went so far as to include, as part of the record, a number of typical contracts in use by the departments with mandatory and optional forms. These appear at pp. 608-616 of the *Report of the Hearings, supra*. In not one instance does the partial payment, title passage clause on work in progress prior to deliveries relied on by appellee appear in those exhibits.

To illustrate, we call attention to a sample letter Order for supplies which appears at pp. 608-9 *(supra)*. W. D. Contract Form No. 7 (Appendix 18a). This indicates in its final paragraph (10) that it is authorized by and nego-

tiated under the First War Powers Act, 1941, and Executive Order No. 9001, December 27, 1942, which permitted partial payments without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. Clearly, terms of the sample contract *are* based on congressional authority and Executive Order. Procurement regulations alone were not considered enough.

Said form only refers to vesting title in Sec. 6f; not in the manner urged here by appellee but only in connection with procedures for settlement of contracts after termination. It is based on the *Contract Settlement Act of 1944 (78th Congress, Public Law 395 Ch. 358).* 41 U. S. C. A. Sec. 101, 112 (e).

It is significant that representatives of the Armed Services had no other partial payment, title passage clause in these typical forms of contracts. It negatives the implication that procurement officers were endowed with the broad powers urged by appellee and the Government. It is persuasive that they intended financing of private contractors engaged in work for the Government under negotiated contracts, to be governed by the means found in *Section 5 of the Act.*

Obviously, silence on the part of defense department representatives deprived members of said Committee from any opportunity of considering the effect of a partial payment-title-passage clause in a negotiated contract. As representatives from the several States to the Congress they would have realized impact of such a clause on local taxation and resulting impairment of our dual system of government.

It is appellants' view that the Committee considered provisions of *Section 5 (b)*, spelling out a lien in favor of

the Government, as the maximum protection necessary for financing of contractors in such cases. Nor was a title passage clause requested by sponsors of the measure. Nor would such a title give any more protection or control to the Government than the paramount lien did.

Attempts to explain the actions of the procurement officers lead to just one conclusion: that partial payment provisions were an afterthought and an overreaching on their part.

In their separate briefs, both the Government and appellee claimed support below for authority to use the partial payment and title passage clause from the language used by Mr. Justice Reed in *Kern-Limerick, supra* at p. 116, U. S.:

> "Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices."

We have pointed out the variance between this view and what was actually stated by Armed Services representatives before the Committee considering the measure. (*Supra* p. 38 and p. 40.)

In practice, the term "type" was used in a specific manner in the prime contracts, further refuting appellee's claim.

We note in Kaiser's (R. 142-3):

> "Type Contract Contemplated: CPFF per Amend. #2. Type Price Redetermination Anticipated in Definitive Contract: Incentive."

Likewise in Wright's (R. 190-1):

> "Type Contract Contemplated: Fixed Price. Type Price Redetermination Anticipated in Definitive Contract: Form H B."

It is our view that the quoted excerpt from *Kern-Limerick* is first of all *obiter dicta** and not in accord with the documentation of the Committee Report aforementioned (pp. 38-42, *supra*). Secondly, it is apparent that the principal legal issue as well as the facts of that case are distinguishable from those present here. (*Infra* 115, 116.)

Just as we claim a difference between the facts at bar from those before the Court in *Kern-Limerick*, similarly the brief of the Government in that case urged differences from *King-Boozer* (*State of Alabama v. King and Boozer*, 314 U. S. 1). In the latter case an Alabama sales tax was upheld where an independent contractor purchased lumber for incorporation in construction work under a government contract.

We contend here, as the Government did in *Kern-Limerick*, that the court below herein erred in not determining the issues presented below giving full consideration to all phases of the contract relations between appellee and its respective prime contractors as well as all terms of the sub-contracts.

The fact that appellee herein is an independent contractor operating under subcontracts; that it made its purchases on its own credit and paid for same itself; that its insurance of the subject property named appellee alone as the party benefiting therefrom; that the Government denied any obligation to the subcontractor; that delivery of finished items was to be made directly to the prime contractors, that requests for payment were made directly to the prime contractors,—all of these factors were ignored in favor of one so-called "overriding consideration" (R.

*The key question submitted and approved by this Court was whether the determination to use purchasing agents, was permissible (p. 116 U. S.).

121) which the trial judge herein held to outweigh the others, and which the Court of Appeals approved.

This, despite the determination of this Court in *King & Boozer, supra,* rejecting the contention of the Government that it was the purchaser based on extensive control by procurement officers over purchases made, whether and what to buy, providing for approval in advance of purchases of $500 or over and inspection and approval before shipment. The following appears at p. 13 of 314 U. S.:

> "But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States v. Algoma Lumber Co.*, 305 U. S. 415, 421, 83 L. ed. 260, 263, 59 S. Ct. 267; *United States v. Driscoll*, 96 U. S. 421, 24 L. Ed. 847. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the contracting officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. *Cf. James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318, *supra; United States v. Driscoll, supra.*"

C. Authority Must Be Found in Statute

Appellee's position with regard to the partial payment and title passing clause is admittedly based not upon statutory authority but upon *Procurement Regulations* (42, 47).* Although careful to claim initial authority for the negotiation of the prime contracts from *Section 2 c of Armed Services Procurement Act, supra*, appellee would have the Court ignore its application to its subcontracts.

It is inescapable that appellee's position must rest squarely on statutory authority from the Act. Otherwise the Committee's stated objective of eliminating possible abuses by its restricted authorization of negotiated purchasing was meaningless.

Ample authority exists in support of appellants' view that claimed authority may not originate solely from rules and regulations of defense organizations in alleged furtherance of a Congressional mandate as found in *Section 5*, (§ 154 of 41 U.S.C).

To so define provisions of an act of Congress as to grant to officials a roving commission to create exemptions from the act falls as an unconstitutional attempt to delegate legislative power (*Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 623). Statutes delegating powers to public officers must be strictly construed (*United States v. Foster*, 131 F. 2nd 3, 7) while all persons dealing with such agents are charged with knowledge of the extent of their authority (*Continental Casualty Co. v. United States*, 113 F. 2nd 284, 286).

It has been held that rules and regulations which aid in carrying out the purposes of a statute must be in accord with the statute, subordinate to and not in conflict there-

*Appendix 6a.

with (*United States v. Forbes*, 36 F. Supp. 131, 134) and the *status quo ante* acts without or beyond the powers bestowed by law may be restored insofar as that may be done (*United States v. Mott*, 37 F. 2nd 860, 862); also regulations which go beyond what Congress has authorized may be disregarded (*Utah Power & Light Co. v. United States*, 243 U. S. 389, 410) since the plain purpose of a valid law cannot be thwarted (*United States v. City and County of San Francisco*, 310 U. S. 16, 31-32).

A regulation that does not carry out the will of Congress but operates to create a rule out of harmony with the statute is a mere nullity (*Manhattan General Equip. Co. v. Comm. of Internal Revenue*, 297 U. S. 129, 134) and an officer in exercising powers conferred upon him by statute and regulation is bound to follow the mode or manner prescribed (*United States v. Jones*, 176 F. 2nd 278, 281). No delegation being given by Congress, the Secretary of War may not prescribe rules and regulations which restrict the application of local regulations (*Penn Dairies v. Milk Control Commission*, 318 U. S. 261, 276); and it has been held that broad powers cannot be merely assumed by administrative officers nor created for them by courts in the proper exercise of their judicial functions (*Federal Trade Comm. v. Raladam Co.*, 283 U. S. 643, 649). Accordingly, principles of general contract law apply to construction of government contracts where Congress has not adopted a different standard (*Priebe and Sons, Inc. v. United States*, 332 U. S. 407, 411).

D. Allegheny Not Controlling Here

Appellee's principal contention that the decision in *Allegheny, supra*, is controlling of the issues here was adopted by both the Trial Judge and the Court of Appeals. However, as already pointed out *supra*, p. 31, no issue was

raised in Allegheny of absence of adequate authorization as urged herein.

Further, that decision was handed down May 1, 1944, prior to amendment of Sec. 529 of Title 31 U. S. C. A. in 1946 and the codification of procurement procedures for the armed services resulting from enactment of the Armed Service Procurement Act in 1947.

Refuting the expressed view in Opinion below (R. 274) that "the facts of that case (Allegheny) are not in any material aspect distinguishable from the facts encountered here" we call attention to the following differences:

In Allegheny, as here, a claim of exemption from local taxation was advanced based on a derivative constitutional immunity of government owned property. However, the nature, acquisition and treatment of the property differed. In Allegheny, according to the opinion below (R. 274) same consisted of one machine manufactured by the manufacturer (Mesta) eight gunboring lathes furnished by the Government and the remainder purchased by Mesta from other machine tool manufacturers. The machinery bought or built by Mesta was inspected and accepted on behalf of the United States which compensated Mesta therefor. The contract provided that the title to all such property should vest in the Government upon delivery at the site of work.

Here it is stipulated (1) that tools already owned and furnished by the United States were not assessed (R. 82); (2) that tools built and completed by appellee under its sub-contracts on which there had been an inspection at the plant prior to January 1, 1952 for use there in performance of said sub-contract were not assessed (R. 82); and (3) that no supplies or sub-assemblies (end-products made by appellee) had been completed, inspected or delivered

to either of its Prime Contractors by appellee prior to January 1, 1952 (R. 83).

Actually assessed against appellee was the value of materials, supplies and uncompleted items on hand on assessment day (R. 83). These had been purchased by appellee, as in the case of any independent sub-contractor, in its own name, on its own credit and not as a bailee or agent for the Government or either prime contractor.

The prime distinction overlooked by the Opinion below is that, even without benefit of a title passage clause, the assessed property in Allegheny was owned by the Government on assessment day. On the other hand absent the controverted partial-payment-title passage clause, no one would suggest that these facts support a claim of title in the Government to the disputed items in Murray's possession on tax day.

Another difference not noted by the Court below is the care exercised by the Assessors to protect rights of the Federal Government, if any,—based on the procedure approved in *S. R. A. Inc. v. Minnesota*; 327 U. S. 558. No mention was made in the Opinion appealed from of the notation on the line where appellee's assessment appeared, "assessed subject to prior rights of Federal Government". Instead the opinion sought to distinguish the facts in S. R. A. as being "the equivalent of a mortgage" (R. 277).

Overlooked, however, is the fact that in its decision in S. R. A. this Court continued on to say (565, U. S.):

> "Territorial jurisdiction in Minnesota does not dispose of this tax problem. The nub of this case, that is the immunity from state taxation of property to which the United States holds legal title, remains. Minnesota took care to leave unassessed whatever

> interest the United States holds. The levy and judgment was 'subject to fee title remaining in the United States of America,' 219 Minn. at 496, 18 N. W. 2nd 446 * * *"

Further disregarded by the Opinion below is the nature of the assessment and tax in question as compared to that in Allegheny.

Here we have a type of assessment which is *ad valorem*, i.e. assessed to appellee upon and according to the value of personal property. This is unlike the case of real estate both in this State and in Pennsylvania, where such assessment land is *in rem*. *Schaefer v. Woodmere Cemetery Co.*, 256 Mich. 332, 239 N. W. 300.

The instant assessment is based on the value of such personal property owned by or in the possession of a person, partnership or corporation, but has characteristics of a tax *in personam* rather than *in rem*. (Sections 1 and 7 Ch. II, Title VI and Sections 1, 26 and 27 Ch. IV, Title VI; Charter of the City of Detroit. (Appendix 14a *et seq.*). Further discussion on the nature and impact of the assessment herein is presented *infra* 94 *et seq.*

Under such provisions of the charter, the taxes based on that assessment here, unlike real estate taxes, may be collected by suit in assumpsit for the collection of the debt against the person or corporation refusing or neglecting to pay such taxes. (See. 26 *supra.*)

This personal liability contrasts sharply with the analysis by Mr. Justice Jackson in Allegheny (p. 184, in 322 U. S.)* of the nature of the assessment against the property there involved: -

*Further analysis of the decision in Allegheny will be presented in connection with the third question of this Brief, *infra*, p. 120.

"It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used *ad valorem* general property tax. This taxation plan involves the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment, the application of a uniform rate calculated on the need for public revenues, and the collection, in default of payment, by distraint and sale of the property assessed and taxed. This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment."

On our roll, the character of the assessment was fixed from the beginning to avoid any threat to the sovereignty of the United States. It charged local officials with notice that there could and should be no interference with functions of the national government in the premises. In effect subjection of the property to the statutory lien was barred and the alternative choice of remedy for collection of the tax from appellee was for all practical purposes the sole means of collection.

In view of the foregoing distinctions, the conclusion of the Court below that *Allegheny* is absolute and irrefutable authority for appellee's claim is unwarranted.

Having examined our contention that the disputed provision in appellee's sub-contract was not fully authorized, we submit that this Court should conclude as follows:

Since all actions of government procurement officers depend on some specific grant of power, the prohibition found in *Sec. 529 of Title 31, U. S. C.* and direction to use the means enacted in Sec. 5 of the *Armed Services Procurement Act* renders the instant partial payment-title passage clause void. It follows that the assessment to appellee on the value of the disputed property must be upheld.

II.

IF INCLUSION OF TITLE TRANSFER PROVISIONS IN APPELLEE'S SUBCONTRACTS WAS AUTHORIZED, DID RELATED CONTRACT TERMS AND THE UNDISPUTED COURSE OF CONDUCT, NEVERTHLESS, ESTABLISH OWNERSHIP IN APPELLEE AND PAPER TITLE IN THE GOVERNMENT?

The lower courts answered "No".
Appellants contend the answer should have been "Yes".

For the purpose of this presentation, appellants assume,

(a) that the Government's contracting agency had legal authority to include partial payment-title vesting clauses in the Government's contracts with Kaiser-Frazer and Curtiss-Wright;

(b) that this authority was broad enough to permit, also, inclusion of such clauses in appellee's subcontracts (to which the Government was not a party*) with said prime contractors; and

---

*See disclaimer of obligation or responsibility of the Government at the end of appellee's subcontracts with Kaiser-Frazer and Curtiss-Wright (R. 172 and 221). The instant case is, therefore, clearly distinguishable on the facts from *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110. In invalidating the tax in that case, the Court held that the Federal agency there involved had a statutory right to authorize a private, independent contractor to act as an agent of the Government for purchase of property, thereby binding the Government to the payment of the purchase price. Murray, on the other hand, could not bind the Government for any debts incurred (R. 172 and 221).

(c) that these clauses were effective to give to the Government some kind of an interest in the property assessed in this case.

Appellants submit, however, that even under these assumptions appellee retained all of the incidents of ownership in the property, while the Government received only a security or paper title* for financing advanced to appellee.

This fact is borne out by the contract terms themselves, such as the provision that the partial payment clause does not relieve the contractor from risk of loss or destruction, or of damage to property in which title "vests" in the Government; the provision granting Murray rights of acquisition and disposition of the property acquired for purposes of the contract; an unrestricted control under the contract, over scrap arising out of and under the contract; and the provision for reversion of "title" to Murray upon liquidation of partial payment. This fact is further bolstered by the actions of the parties in carrying out the contract provisions—a course of conduct which clearly indicates an intent by the contracting parties entirely consistent with the theory of appellants.

For the purposes of this section of the brief, appellants also do not question the proposition that absent express Congressional consent, a beneficial interest of the Government in property is exempt from state and local taxation. By the same token, however, it cannot be reasonably disputed that property is subject to such taxation if ownership thereto is vested in someone other than the Gov-

*The term "paper title" was used in the case of *Offutt Housing Company v. Sarpy*, 351 U. S. 383. It is fully descriptive of the title held by the United States Government in the present case.

ernment and the Government holds merely a security or paper title to such property to secure financing.

We approach the problem, therefore, by an interpretation of the purpose, nature, and legal effect of the partial payment-title vesting clauses contained in Murray's subcontracts.*

Purpose of Partial Payment-Title Vesting Clauses in Government Contracts

The business and industrial structure of the United States is largely built upon credit and financing, and in most instances property is encumbered or pledged as security for the loan or credit extended. Because of its tremendous growth, American industry today finds it economically unfeasible to tie up working capital required for labor, materials and tools necessary for the proper discharge of sizeable contracts. For this reason, it is customary for a contractor to receive interim financial assistance. This is now almost universally true of the aircraft industry whose contracts with the Government, particularly in connection with war effort, has reached staggering proportions.

Provision for partial payments was made in the First War Powers Act of 1941 as amended, as it had been in earlier legislation (hereinbefore fully discussed; pp. 34-35). Inability of many manufacturers to accept and perform Government contracts without financial assistance was a compelling reason for providing such payments. It is so stated in the Report of the Committee on the Judiciary to the United States Senate** in connection with the

---

*Partial payment provisions, subsections (a), (b), (c) and (d), Appendix, pages 6a-7a.

**Report No. 911, Senate Misc. Reports IV, U. S. 10546.

Act mentioned. The Committee reasoned that provision for the partial payments "will make it possible to bring the small businessman into the defense program."

Thus, viewed realistically, the partial payment title vesting provisions are simply a method of financing Government contracts.

The Court's Approach to Tax Questions

In tax cases, this Court has always been concerned with the substance of the relationship involved. The mere formalities of a written instrument which alter tax liabilities have not been permitted to disguise the true nature of the transaction.

This Court said in *Helvering v. F. R. Lazarus and Company* (1939), 308 U. S. 252, 255:

> "In the field of taxation, administrators of the law and the courts are concerned with substance and realities, and formal written documents are not rigidly binding."

Various other cases have readily adopted these principles. In *S. R. A., Inc. v. Minnesota* (1945), 327 U. S. 558, this Court upheld a Minnesota tax on property held by a land contract vendee even though "legal title was retained by the United States for security purposes."

In *Offutt Housing Company v. Sarpy* (1956), 351 U. S. 253, this Court held Nebraska could tax the full value of buildings and improvements held under a 75-year lease from the Federal Government, the Court stating at page 261:

> "Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interest created and so does not solve the

> problem * * * the government may have 'title' but only a paper title. * * *"

Again in the field of income taxation, a similar rule has been accepted by the courts. In *Corliss v. Bowers* (1929), 281 U. S. 376, 378, this Court upheld a statute taxing the income of a revocable trust to the grantee even though legal "title" was in the trust. The Court states:

> "* * * Taxation is not so much concerned with refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

In *Wisconsin Central Railroad Co. v. Price County* (1889), 133 U. S. 496, the appellant was in the process of purchasing certain lands from the U. S. Government. Appellee levied a tax upon these lands prior to the issuance of the patent at a time when legal title was vested in the U. S. Government. This Court stated at page 505:

> "This exception to the general doctrine is founded upon the principle that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation."

The *Wisconsin Central* quotation was cited favorably by the Supreme Court of Nebraska in *Offutt Housing Co. v. Sarpy*, 160 Neb. 320, 70 N. W. 2d 382, 392, where the Court concluded that even though the Government maintained controls over the property in the hands of Offutt and purported to take legal title, it was a "bare legal title" that did not in any manner deprive Offutt of the ownership of its interest.

In *Commissioners v. Court Holding Company*, 324 U. S. 331, the Court, looking through a liquidating dividend of

a corporation made under circumstances which would reduce the income tax to the individual stockholders, stated at page 334:

> "The incidence of taxation depends upon the substance of a transaction. * * * To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of tax policies of Congress."

The purport of the foregoing tax decisions clearly is, that the courts would not allow parties by the mere formalities of instruments to defeat the tax claims of the U. S. Government. By the same token, Murray, Kaiser and Curtiss-Wright should not be permitted to use such means to defeat the legitimate tax claims of state or local units of Government. We therefore look beyond the formalities of a single clause of the instrument directly to the substance of the relationship between appellee and the Government. This approach leads us to the logical conclusion that beneficial ownership was in appellee which was, therefore, subject to the personal property tax.

Basic Principles of Ownership

In keeping with the doctrine of substance rather than form, it is a basic principle of law that title and ownership are not necessarily synonymous and that title is often held simply as a means of conferring a lien. Particularly is this true in the area of sales of personalty where a transfer absolute on its face will be deemed a mortgage if intended as such by the parties. *Benton v. Commissioner of Internal Revenue* (1952), 197 Fed. 2d 745, 754.

Brown on *Personal Property*, Section 5, pages 6-7, states:

> "In the legal sense * * * property means not the thing itself, but the rights, which inure in it. Ownership, or the right of property is, moreover, not a single indivisible concept, but a collection or bundle of rights, of legally protected interests. The owner of a given piece of land or chattel has not only the interest of possession, and enjoyment and user, but also that of transfer to another. * * *.
>
> The person to whom the various rights in a thing normally and customarily reside we term the owner thereof. * * *."
>
> "Both in common parlance and in legal acceptation, he is the owner of property who, in the case of its destruction, must sustain the loss of it." *42 Am. Jur.*, page 215, Section 37.

In the instant case the Government exercised no acts of ownership over the property in the hands of appellee, nor did it retain any incidents of ownership in the property covered by the subcontract provisions. Appellee, on the other hand, had full control and possession of the property involved, exercising all the rights of ownership normally attaching to personal property.

Provisions of the Contract Do Not Establish Ownership in the Government

We turn now to an examination of the rights of the parties in the property covered by the subcontract to ascertain whether the Government, in fact, possessed, under the agreements, any of the normal incidents of ownership.

(a) Risk of Loss Provision

The Government specifically provided against and refused to accept any responsibility for risk of loss to the materials in the possession of appellee. Thus, the subcontracts provide:

"(e) The Article of this contract captioned 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provision hereof" (R. 177).

Appellee clearly showed its control and ownership of the material in its possession by contracting certain insurance policies covering the goods. It is conceded that appellee is named as the sole beneficiary under said policies (R. 83).

It is significant that if the property had been destroyed it necessarily would have had a value in excess of the partial payments. Under the above arrangement, if destruction of the property caused appellee not to perform its obligation, the Government would not be entitled to reimbursement for the value of the property destroyed, but merely to recover its money paid out in the form of partial payments. This is entirely inconsistent with any theory of Government ownership of the property. If the parties had regarded the inventories as Government property, appellee would not have been permitted to handle its insurance in this manner. *U. S. v. Ansonia Brass and Copper Company*, 218 U. S. 452, 466.*

*In Ansonia, the contract provided that the parts (of the ship, not materials) paid for under the system of partial payments would become thereby the sole property of the U. S. The insurance provision of the contract provided: "Section 212 provided for insurance against fire and marine risks at the contractor's cost, for and on behalf of the U. S. to at least the amount of each partial payment."

In keeping with the principles of insurance law, an insurance contract runs to the person, not to the property, and indemnifies the person or individual who holds a beneficial interest or ownership. (*29 Am. Jur.*, page 47, Section 3.). Since Murray insured the property and named itself as sole beneficiary, it would appear that Murray considered itself the beneficial owner of the property.

The Government was aware that risk of loss fell upon Murray. The provision in the subcontracts relieving the Government from any liability for loss or destruction of the property (R. 177) was approved by a Government contracting officer (R. 86, 178). This indicated not only that Murray felt itself the holder of the beneficial title, but that the Government acquiesced in this view.

The Supreme Court of Wisconsin in *American Motors Corporation and United States of America, Intervenor v. City of Kenosha** (1957), 80 N. W. 2d 363, 274 Wisc. 315, had before it identical partial payment-title vesting clauses as those in the appellee contracts. The Court, speaking of identical risk of loss provisions as those in appellee's subcontracts, states at page 366:

---

*The facts of the American Motors case show that on March 27, 1951, the American Motors Corporation entered into a contract with the United States Government, Department of the Air Force, for the manufacture and supply of aircraft engines, repair and replacement of parts, overhaul, tools, test and ground handling equipment and miscellaneous services and equipment in connection therewith. This contract, known as a letter contract, was amended on March 18, 1952, and supplemented on March 29, 1952, by a definitive contract. The definitive contract contains a clause which provides in substance that upon the making of any partial payment, title to all parts, materials, inventories, work in progress and non-durable tools theretofore acquired or produced by the company for the performance of the contract and property chargeable to the contract under sound accounting practice, shall vest in the Government and that title to all like property thereafter acquired or produced by the company for the performance of the contract and properly chargeable as aforesaid shall vest in the Government forthwith upon such acquisition or production.

"Sub. (e) provides that the Company shall have the complete 'risk of loss or destruction of or damage to property to which title vests in the government under the provisions hereof.' * * *

"As stated in *42 Am. Jur.*, Property:

"'Both in common parlance and in legal acceptation, he is the owner of property who, in case of its destruction, must sustain the loss of it.' Sec. 37, p. 215."

The risk of loss provision provides an important and generally accepted indicia of ownership in appellee. Appellee is the owner of the property for, "in the case of its destruction, he must sustain the loss of it."

(b) The Right to Acquire and Dispose of Property

By the provisions of its subcontracts appellee retained rights to acquire and dispose of the property in its possession. The Government was interested in the acquisition and disposition of property acquired thereunder for the sole purpose of determining whether the elements of costs submitted by the prime contractor in its request for partial payments were supported by the records of the subcontractor.

The partial payment provision of appellee's subcontracts, subdivision (d), (R. 176), was identical with that in the American Motors case, *supra*. Subdivision (d) of the partial payments clause provides in part:

"The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, * * *."

Subdivision (d) of the partial payments clause further provides that the agreed price in the case of acquisition by the company, or the proceeds in the case of disposition, shall be paid or credited to the Government account.

The Supreme Court of Wisconsin in the American Motors decision, *supra*, stated at page 367:

> "The only regulatory control which the Government has over the property with respect to the Company's right to 'acquire and dispose of' it prior to delivery and acceptance, amounts to no more than supervision of the bookkeeping to see to it that the Government is not charged for any of the property so acquired and disposed of. These facts are inconsistent with ownership in the Government."

That the Government control over the Murray subcontracts was no more than a supervision of the bookkeeping is conclusively shown in the present case by stipulated facts which parallel the facts appearing in the Wisconsin American Motors case, *supra*. Stipulation No. 2 (R. 86, 87), states:

> "(4)(a) The United States Air Force representative (i) inspects goods produced by Murray under each subcontract at the Murray plant in Detroit, (ii) audits Murray cost data and approves Murray's requests for partial payments, (iii) participates in Murray's negotiations with the prime contractors on price redetermination and after a redetermined price with the prime contractor is agreed upon the contracting officer assigned to the prime contract approves of such redetermined prices with Murray before they become effective; (iv) approves, through the contracting officer at Murray, any overtime authorized or paid by Murray, and (v) reviews Murray's accounting procedure and periodically spot-checks its figures.
>
> "(b) * * *.

"(c) All the foregoing in this paragraph is done to effect a clearance for the prime contractor with the Air Force under his prime contract insofar as the goods are produced for use under the prime contracts and payments by the prime contractor to the subcontractor are an element of cost to be cleared by the Air Force when billed therefor by the prime contractor.

"(d) Otherwise, the Air Force has no direct supervision over the subcontractor with respect to the subcontractor's costs."

Such right to acquire and dispose of property (R. 176) are incidents of ownership inconsistent with the passage of absolute title from the appellee to the Government. Appellee has retained the incidents of ownership while the Government has retained security for its advances to appellee.

(c) Unrestricted Control of Scrap

Subdivision (d) of the partial payment provision provides:

"* * * current production scrap may be sold by the Contractor without approval of the Contracting Officer, but the proceeds will be applied as provided in this paragraph (d), * * *." (R. 176.)

The provisions for the application of the proceeds appearing in paragraph (d) read:

"* * * the agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. * * *" (R. 176).

Current production scrap may be sold by appellee without approval of the Government. With respect thereto, appellee is the sole judge of what materials shall be scrapped, how much, to whom it shall be sold and for what price, providing only that the proceeds be applied in accordance with the officer's direction.

(d) Provision for Liquidation of Partial Payments

Further evidence of security title in the Government is the provision in the partial payment section of the subcontract, which reads:

> "(d) * * * Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor" (R. 176, 177).

The appellee contended in the lower court that the reason for the inclusion of the partial payment clauses was to secure the Government's control over materials and work in process in the event of a strike or other contingency. But this provision of the contract permits this so-called "Government Title" to revest in the contractor or subcontractor as soon as the Government has been delivered goods equivalent to the value of its investment therein. This would not appear to be the type of clause which the Government Procurement Officers would insert if their real purpose was to secure control of the raw materials and work in process in the hands of the subcontractor. Nor can we assume that the action of the Procurement Officers for the Defense Department was

undeliberate. They have dealt with these problems for many years and have a tremendous backlog of experience in this field. The only assumption that can reasonably be made is that they were acting to secure and to protect the interest which they felt needed protection, namely, that of the Government's investment.

Let us consider how this provision works in practical operation. Assuming that the partial payments to appellee represent one-quarter of the total contract price, then as soon as goods equivalent to that valuation were delivered and accepted by the Government, under this provision, the remaining materials, inventories, and work-in-process, still in the hands of Murray or subsequently acquired, which might possess a value far in excess of these partial payments, would be the sole property of appellee. (See *U. S. v. Lennox, infra*, pages 309-310.)

It is immaterial that the contracting parties had not reached the stage in their dealings where "title" would revest in appellee because of liquidation of all partial payments or completion of delivery. As the Wisconsin Supreme Court stated, in the *American Motors* case, *supra*, at page 366:

> "It is immaterial, as set forth in the stipulation of facts, that the company has never acquired or disposed of any of the property as permitted under this clause, *since it is the right of the company thereunder rather than its acts that control.*" (Emphasis added.)

The Government wanted complete aircraft from its prime contractors, and this was its sole objective. It would be difficult to reach any other conclusion in the face of this provision for the liquidation of partial payments inserted by the Procurement Officers which automatically cancels the Government's so-called "title" in these materials upon liquidation of these partial payments.

The identical partial payment-title vesting clause with which we are concerned here has already received interpretation by the Court of Appeals for the Second Circuit in *United States v. Lennox Metals Manufacturing Co.*, 225 F. 2d 302. In that case, the clause appeared in a contract entered into by the Government with Lennox for the manufacture of certain war materials. After making partial payments, the Government withheld further payments requested by Lennox and subsequently declared the contractor to be in default. The Government then filed a suit to recover from Lennox the payments already made and to take from it the property in its hands. It asserted a right to terminate the contract "whenever the contracting officer shall determine that such termination is in the best interest of the Government." Ownership was claimed by the Government, with a right to take the property under the partial payment-title vesting clause.

The appellate court appraised the Government's denial of partial payments to Lennox as wrongful and as precluding the Government from seeking equitable relief. After denying recovery of the partial payments, the court said, with reference to the Government's claim of title to the goods purchased for the purpose of the contract, at page 317:

> "The only other relief sought is, essentially, the enforcement of an equitable lien on defendant's property."

Judge Frank, in a separate concurring opinion, said at pp. 309, 310:

> "At the trial, government counsel conceded that, under the interpretation for which the *government* then *contended, the clause would give the government, upon termination of the contract, title to thousands of dollars of property even if the govern-*

ment had made a partial payment of but $50.00. If this interpretation were correct, then the clause 'set a skillful trap' for the 'unwary' defendant, and 'No such purpose should be attributed to the government. * * *. In construing the document the presumption should be indulged that both parties were acting in good faith.' *Sylvan Crest Sand & Gravel Co. v. United States*, 2 Cir., 150 F. 2d 642, 643. * * * As the government now seeks to construe the contract, it comes close to being '"such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other"'; *accordingly, that construction should be rejected if possible.* See *Hume v. United States*, 132 U. S. 406, 415, 10 S. Ct. 134, 137, 33 L. Ed. 393; *Scott v. United States*, 12 Wall. 443, 445; 20 L. Ed. 438." (Emphasis added.)

(c) Recapitulation

Appellee had the entire "bundle of rights" in the property under its control. It insured the property in its own name, reserved the right to acquire and dispose of materials, reserved to itself the final determination as to what items would be scrapped or reworked without Government approval, and, furthermore, it conducted itself as the owner of the property in its possession.

It is apparent from all the provisions in the contract that the Government was not interested in the specific items contained in appellee's inventories. What it wanted and what it was buying *from its prime contractors* was aircraft assemblies and parts. The raw materials upon which partial payments were requested represented no more than security for the protection of advances made to appellee.

The only possible conclusion that can be drawn from the contract provisions is that security for its financing was

intended by the title transfer to the Government. Its obvious purpose was merely to give the Government a hold on materials and work in process as security for moneys paid to the extent, and only to the extent, of such moneys advanced to appellee in the form of partial payments.

Any other conclusion would render meaningless and ineffective the reservations of the partial payment provisions. It would require a strained construction of the entire contract to single out the title passage provision and to ignore the remaining contract terms.

In *American Motors, supra*, the Court reflected on these incidents of ownership in the following language (page 367):

> "In our opinion, the unrestricted right of the Company under the contract to acquire and dispose of the property and the risk of loss are elements of ownership inconsistent with the vesting of such title in the Government as would render the property immune from taxation. Conceding that title was transferred; there was, however, no true transfer of ownership."

We submit that in view of the decision in the above case, as well as in the Lennox case, there is both state and federal court authority supporting appellant's contentions.

We further submit that had the circumstances been somewhat different in this case, even appellee would not dispute our theory of an equitable lien. In the Lennox case, the Government and the contractor were contestants. Here, Murray's position appears to be identical with that of the Government as both seek to avoid the tax. If the Defense Department were to turn upon Murray as it did upon its other comrade-in-arms, who can doubt but that Murray would seek to don the cloak of Lennox, and adopt a theory of equitable lien?

The Conduct of the Parties Was Inconsistent With the Claim of Beneficial Title in the Government

Not only does Murray retain the incidents of ownership under the provisions of this contract, but the parties, by their actions, show that they themselves considered the contract as creating beneficial title in Murray and a security title in the Government. The following facts are pertinent to an examination of this problem.

1. No notice was given to creditors of appellee of the partial payment and transfer of title clause (R. 95, 96).

2. No written documents of any kind pertaining to transfer of title were executed and delivered by appellee to the Government following request for a receipt of partial payment (R. 96).

3. With respect to the tools made by appellee under the subcontracts, there was no delivery to anyone, only inspection and billing for a completed tool by Murray to the prime contractor and by it, in turn, to the Government (R. 95).

4. No change was claimed to have been made by appellee in its accounting procedure or methods after the receipt of partial payments. It was admitted that some materials purchased on other defense contracts, to which no claim of governmental title was subsequently lodged, were kept in the same account as the property assessed (R. 96).

5. In its published annual report in 1951, moreover, appellee did not make reference to a sum of $125,000 as a segregated item of accounts receivable

under the subcontract in question. This amount represented the total partial payment requests submitted before August 31, 1951, on which payments were received later that same year (R. 97).

6. Appellee made no change in its physical treatment of the property assessed after the request for and receipt of partial payments. In this connection, appellee claimed to treat the property from the very beginning as it did after receiving its first partial payment (R. 98).

7. No deliveries of completed parts or sub-assemblies manufactured by Murray had been made to either Kaiser or to Curtiss-Wright on January 1, 1952 (R. 52).

8. The power to determine whether rejected items should be reworked or disposed of as scrap was left to appellee's employees (R. 98).

9. The billing of completed items which appellee was to manufacture and deliver was handled in the usual manner, naming the subcontractor as consignor and the principal contractor as consignee, with no indication that goods being shipped were the property of the Government (deposition Exhibits 3 and 4). The same procedure was used in disposal of scrap (deposition Exhibits 9 and 10).

10. Although some inspection was made by a Government officer of sub-assemblies at the appellee's plant, nevertheless, the provisions of the prime contracts in both instances called for final inspection and delivery to the United States Government of the aircraft by the contractor—in the case of Kaiser at its airfield at Willow Run,

Michigan, and in the case of Wright, F. O. B. Carriers' Equipment at the plant or plants of the latter (R. 88, 89).

11. Appellee alone was named as the beneficiary under its insurance policies in force on January 1, 1952, on all the personal property in question (R. 83).

In *Offutt Housing v. Sarpy*, 351 U. S. 252 (1955), the Government leased to appellant for 75 years land located on an air force base. Appellees constructed certain buildings on the property which had a useful life of 35 years. The Government prescribed maximum rents, selected occupants, and had a voting interest in appellant corporation. At the time when the buildings were erected title to all buildings and property vested in the Government pursuant to the terms of the agreement between the Government and Offutt.

This Court, in holding these properties taxable to the appellant, stated at page 261:

> "The lease is for 75 years; the buildings and improvements have an estimated useful life of 35 years. The enjoyment of the entire worth of the buildings and improvements will therefore be petitioner's. * * *" The Government may have 'title', *but only a paper title*, and, while it retained the controls described in the lease as a regulatory mechanism to prevent the ordinary operation of unbridled economic forces, this does not mean that the value of the buildings and improvements should thereby be partially allocated to it." (Emphasis added.)

Applying these facts to the case at bar, we find that the terminology of a clause does not resolve the issue if the contract provisions and the conduct of the parties are not

consistent therewith. The Court is not precluded from ascertaining the real interests of the parties.

The language of the partial payment title vesting clause in the contracts in dispute, though seemingly unambiguous, is not determinative of the rights of appellee or the Government.

As Justice Holmes so aptly stated in *Toucey v. Elmer*, 245 U. S. 417, at page 425:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Looking beyond the bare bones of the word "title" to the circumstances surrounding the performance of the contract, we find here as in Offutt that the acts of the parties were inconsistent with the claim of title, and that this purported transfer of "title" accomplished nothing more than to establish a lien for moneys advanced. Appellee has retained not only the entire "bundle of rights" normally incident to ownership, but has in practice treated the property as its own.

Army Regulations Treat Payments, Whether Partial, Progress or Advance, as Method of Financing

Further corroborative evidence that all types of advancements, whether partial, progress or advance payments, are fundamentally regarded as methods of financing, is found in Army Regulations. For example, Department of Defense Draft No. 7800.1 (October 30, 1953); 1 C. C. H. Government Contracts Rep. paragraph 8017, commences with these words:

> "The purpose of this directive is to establish basic contract financing policy for the Department of Defense to assure proper uniformity in policies,

procedures, and forms, and to provide for application of the fundamental management principle of internal check and balance.

"The term 'financing' as used in this directive covers government guaranteed loans, advance payments, and progress payments (not including partial payments for delivery of one or more completed units called for under a contract) necessary for both performance and termination purposes, to the extent authorized by law (insofar as progress payments are concerned, it is contemplated that contract financing officers will participate in the development of appropriate standard contract provisions designed to avoid undue risk to the Government and would participate only in specific cases involving unusual financial arrangements and conditions).

"Financing must support procurement, and should be designed to aid not impede essential procurement, but should be so administered as to avoid the risk of monetary loss to the Government to the extent compatible with aiding essential procurement. * * *".

It is somewhat significant that this same rationale was adopted under the Contract Settlement Act of 1944, 41 U. S. C. A. Section 10, *et seq.*, where these various types of advancements are again lumped together as methods of "interim financing." 2 C. C. H. *Government Contracts Rep.*, paragraph 10,036.

Title 41 U. S. C. A., Section 103(i), reads:

"The term 'interim financing' includes advance payments, partial payments, loans, discounts, advances, and commitments in connection therewith and guarantees of loans, discounts, advances, and commitments in connection therewith and any other type of financing made in contemplation of or related to termination of war contracts."

Under large procurement contracts, either for the Government or for private industry, a considerable "lead" time* usually elapses between commencement of work under the contract and the delivery of completed units. As the above quoted regulations clearly recognize, few contractors are in a financial position to supply and tie up working capital which is required during this period for labor, materials, and tooling needed for production under the contract.

Further support for our contention that the Government was primarily interested in security for its advances is found in the *Manual for Control of Government Property* in possession of contractors (May 1, 1951), 1A C. C. H. *Government Contracts Rep.*, paragraph 29,753, which contains this definition of the term "Government Property":

> "(e) *Government property* means all property owned by or leased to the Government, including property acquired by the Government under the terms of a contract; except that *property to which the Government has acquired a lien or title solely as a result of partial, advance or progress payments shall not for the purpose of this Manual be classified as Government property.* With this exception, Government property includes both Government-furnished property and contractor-acquired property as defined below:
>
> "(i) *Government-furnished property* is property in the possession of or acquired directly by the Government and delivered or otherwise made available to the contractor; and
>
> "(ii) *Contractor-acquired property* is property procured or otherwise provided by the contractor

*Appellee entered into its contracts on March 23, 1951 (R. 40), and April 19, 1951 (R. 46), respectively, and had not at the date of assessment, January 1, 1952, delivered any completed units to their prime contractors, Curtiss-Wright or Kaiser-Frasier Corporation (R. 95).

> for the performance of a contract, pursuant to the terms of which title is vested in the Government." (Emphasis added.)

This regulation governs the handling of Government property while in the physical possession of contractors and subcontractors. By the terms of the regulation, the Government did not intend to be, nor did it regard itself as really "owning" this sort of property.

There would be no reason for the exception of materials such as those acquired by Murray from the general class of "Government property" if the Government considered itself as having beneficial title thereto. The only reason for making a special classification of property held as a result of partial, advance or progress payments would be that in these cases the Government does not have the same type of interest therein that it has in the balance of its personal property.

It must be acknowledged that the Government has a beneficial interest in its personal property, and can make regulations for its control. If the above quoted regulation relieves raw materials acquired in this manner from the prescriptions imposed upon Government property, it follows that the Government did not consider itself possessed of beneficial title therein.

Summation

To borrow the words of this Court in *Griffiths v. Commissioner* (1939), 308 U. S. 355, 357:

> "'A lawyer's ingenuity devised a technically elegant arrangement * * *.'"

which did not change the true nature of the transaction.

The inclusion of a single clause in a subcontract providing for the vesting of "title" should not be construed to

pass a beneficial title, where the creation of such title is inconsistent with the contract.

The theory of appellee ignores the fact that in tax cases courts disregard formalities. A narrow construction limited to only one clause of this contract would require the Court to disregard the provisions of the contract dealing with risk of loss, the right to acquire and dispose of property, the unrestricted control of scrap, and the liquidation of all partial payments. Under such a construction, the conduct of the parties, which recognizes the "bundle of rights" in Murray growing out of the contract provisions, must also be totally ignored.

When the contract provisions are interpreted as vesting beneficial ownership in Murray, they become fully meaningful and can be reconciled with the conduct of the parties. The Government's financial interest is fully protected with a prior lien. Such an approach leads logically, without strained construction, to the conclusion that the "title" of the Government was essentially an equitable lien on appellee's property. *U. S. v. Lennox Metal Manufacturing Co., supra.*

Thus, Murray, having beneficial ownership, is subject to the local personal property taxes levied by the City of Detroit and the County of Wayne.

III.

ARE THESE STATE AND LOCAL LAWS AND NON-DISCRIMINATORY TAXES LEVIED THEREUNDER VALID NEVERTHLESS AS IMPOSING NO DIRECT BURDEN ON THE FEDERAL GOVERNMENT IN VIOLATION OF ITS IMPLIED CONSTITUTIONAL IMMUNITY?

The Lower Court answered "No."

Appellants contend the answer should be "Yes."

A. Doctrine of Implied Constitutional Immunity

The doctrine of implied constitutional immunity of the Government from taxation or control by the States was originally propounded by Chief Justice Marshall in *M'Culloch v. Maryland*, in 1819, 4 Wheat. 579. This rule and the basic theory back of the direct burden or incidence test as now applied by this Court in determining the validity of local taxes when the Federal government as its property or institution is involved were first enunciated by Chief Justice Marshall in *M'Culloch v. Maryland*. What Chief Justice Marshall said was that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

The Chief Justice, in arriving at the above-quoted conclusion, had, earlier in his opinion, laid down a rule which he felt should be followed in determining the implied immunity of the Federal Government, under the Constitution, from taxation by the States, in the following language (p. 607):

> "If we measure the power of taxation residing in a state, by the extent of sovereignty which the peo-

ple of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers." (Italics ours.)

The State of Maryland and other States at that time were fearful of Federal power and felt that the expansion of the United States Bank's activities into their States was but a prelude to other and greater expansions of Federal activities and controls over local functions and activities, including slavery. The major issue in that case was

not the tax involved but the question of the validity of the Act of Congress creating the Bank of the United States. Chief Justice Marshall and the entire Court were subjected to abuse and criticism for a long time after that decision and demands were made for removal of the entire bench. The Chief Justice was well aware of the cold war which had been going on between the States and the Federal Government for a long time previous to his decision and it was further impressed upon him and the rest of the Court by the learned lawyers who argued the cause for nine days.*

Against that background and knowing well the purpose of the tax before him, as well as other similar taxes then being levied, such as the one in his home State of Virginia (a $50,000 annual tax on each United States Bank Branch) the Chief Justice was impelled, in the interests of protecting the Federal Government from its avowed enemies, to strike down this frank attempt to destroy an agency of that Government.*

Chief Justice Marshall, however, feeling that possibly too broad an interpretation might be made of the rule he laid down, recited circumstances under which taxes on the bank would be valid (p. 609, 4 Wheat.):

> "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax laid upon the real property of the bank within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instru-

*See "The Life of John Marshall" by Albert J. Beveridge, Vol. IV, Chap. VI.

ment employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

See: *Union Pacific R. R. v. Peniston*, 85 U. S. 787, 792,
and
Thomson v. Union Pacific R. R., 76 U. S. 792, 798.

It should be noted that even though he found the bank to be a government institution, he considered a non-discriminatory tax on its property no threat to the government.

The exceptions he made were as to uniform or non-discriminatory taxes on property or stock of the bank which would not have been the same as taxes, as he phrased it, upon the "means employed by the government in carrying out its operations." The language of Justice Marshall, oft-quoted, that "the power to tax is the power to destroy" should be read in the light of the facts in that case, to which he applied it, namely, as to a discriminatory tax (or as Wm. Pinckney, who argued the cause for the bank, put it, a "political" tax*), rather than a non-discriminatory tax and, also, consideration should be given to the source from which it was derived. The phrase first ap-

*4 Wheat. p. 598:

"But this tax is leveled exclusively at the branch of the United States Bank established in Maryland. There is, in point of fact, a branch of no other bank within that state, and there can legally be no other. It is a fundamental article of the state constitution of Maryland, that taxes shall operate on all the citizens impartially, and uniformally, in proportion to their property, with the exception, however, of taxes laid for political purposes. This is a tax laid for a political purpose; for the purpose of destroying a great institution of the national government; and if it were not imposed for that purpose, it would be repugnant to the state constitution, as not being laid uniformly on all the citizens, in proportion to their property."

peared in the argument made by Pinckney, who said (4 Wheat., p. 598):

> "The power to tax, *without limit or control, is the power to destroy.*" (Emphasis supplied.)

Guiding Principles and Limitations of Immunity Doctrine

In 1869 the Court interpreted and applied the limitations of the Marshall doctrine and again warned of attempts to extend the principle *Thomson, et al. v. The Union Pacific Railroad Company*, 76 U. S. 792 at p. 798.

> "It is unquestionably true that the court (in *M'Culloch v. Maryland*) in determining the second general question (the validity of the tax) already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation (by) the State of Maryland; although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States: and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers and functions. It did not owe its existence, or any of its qualities, to state legislation. And its exemption from taxation was put upon this ground. Nor was the exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State; nor to interests held by citizens of the State in the institution.
>
> In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The state tax held to be repugnant to the Constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government, is a proposition that needs no argument to support

it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in which the real estate, or other property of a corporation not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

It is true that some of the reasoning in the case of *M'Culloch v. Maryland*, seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the Government of the United States.

And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon state taxation, derived from the express permission to tax shares in the national banking associations, is to be so construed as not to embarrass the imposition or collection of state taxes to the extent of the permission fairly and liberally interpreted. *Bank of Louisville v. Kentucky* (76 U. S. 701); *Lionberger v. Rouse* (76 U. S. 721).

We do not think ourselves warranted, therefore, in extending the exemption established by the case of *M'Culloch v. Maryland*, beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection.

We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the General Government within its constitu-

tional sphere. We fully recognize the soundness of the doctrine, that no State has a right to tax the means employed by the Government of the Union for the execution of its powers. But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally taxation of the means.

No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection. *Lane County v. Oregon* (*ante* (74 U. S.) 191, 105); *Bank v. Kentucky* (*ante* (76 U. S.) 701).

We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations, more or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to state taxation if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the state governments.

And in 1873 in *Union Pacific R. R. v. Peniston*, 85 U. S. 787, 791, 795, this Court interpreted both *M'Culloch* and *Thomson*, above as proscribing taxes, the direct effect of which was to hinder the exercise of the powers of the Government and approving taxes which only remotely affect the efficient exercise of Federal powers. At page 791 (85 U. S.), the Court said:

> "While it is true that government cannot exercise its power of taxation so as to destroy the state governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government. The Constitution contemplates that none of those powers may be restrained by state legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government, or interfere with its operations to such an extent, or in such manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they must ever be, co-existant with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.
>
> "All state taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged,

and a tax upon his property generally has not been regarded as beyond the power of a State to impose. In *Bk. v. Kn.*, 9 Wall. 353 (76 U. S. XIX, 701), when the right to tax national banks was under consideration, it was asserted by us that the doctrine cannot be maintained that banks, or other corporations or instrumentalities of the government, are to be wholly withdrawn from the operation of state legislation. Yet it was conceded that the agencies of the Federal Government are uncontrollable by state legislation, so far as it may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government.

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they are intended to serve it, or does hinder the efficient exercise of their power."

Both the *Thomson* and *Peniston* statements of the basic principles of immunity and its limitations, as above quoted and as reasserted in *Willcuts v. Bunn*, 282 U. S. 216, and *Metcalf v. Mitchell*, 269 U. S. 523, were used by Chief Justice Hughes in *James v. Dravo*, 302 U. S. 134 (followed since by such cases as *Esso Standard Oil v. Evans*, 345 U. S. 495; *Graves v. New York*, 306 U. S. 466; *Helvering v. Mountain Producers*, 303 U. S. 376; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma Tax Com. v. Texas Co.*, 336 U. S. 342; *S. R. A. v. Minnesota*, 327 U. S. 558; *Smith v. Davis*, 323 U. S. 111, among others) as the basis for the Court's adoption of the modern version of the rule that if the direct burden or incidence of the tax is not on the Government and the taxation does not in any substantial

way interfere with the performance of federal functions but the effect is only remote, then it should be valid.

While the *Thomson* and *Peniston opinions* declared that the limitations or exceptions to the application of the general principles of immunity as pronounced by Chief Justice Marshall should be observed and taxes which were not directly on and only remotely interfered with the operations of the Government should be valid, later decisions of this Court have disregarded those limitations and invalidated a great number of taxes only remotely affecting the United States, principally economically. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218;* *Indian Motorcycle v. United States*, 283 U. S. 570; *Graves v. Texas Co.*, 298 U. S. 393; *Gillespie v. Oklahoma*, 257 U. S. 501; *Roger v. Graves*, 299 U. S. 401, *et al.*

But the extensions of the doctrine of immunity by these decisions have either expressly or impliedly been overruled by the reassertion of the limitations expressed in

---

*Justice Holmes, dissenting with Justices Brandeis and Stone, in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223-226, declared the power of this Court to prevent attempts to levy destructive taxes:

"But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one.

"To come down more closely to the question before us, when the government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the state that makes the business possible is just as necessary an element in the cost of production as labor or coal. * * *"

the *M'Culloch, Thomson* and *Peniston cases* (heretofore discussed) in the opinions and decisions of *Draco; Graves v. New York; Helvering v. Mountain Producers; Alabama v. King & Boozer; Esso v. Evans; Oklahoma Tax Com. v. Texas Co., supra*, among others. Since 1937, when *Draco* was decided, this Court has maintained an interpretation and application of the immunity principle in conformity with *M'Culloch, Thomson* and *Peniston* validating taxes not directly imposed on the Government or its institutions and only remotely affecting Government functions and in doing so has regarded the substance and direct effect of the tax, not the form, type or label as determinative of its incidence.

In other words, this Court has restored the fundamental principles of true inter-governmental immunity and its limitations. In *James v. Draco*, 302 U. S. 134, 150, 153-156 Chief Justice Hughes said:

> "We said (in *Willcuts v. Bunn*, 282 U. S. 216, 225): 'The power to tax is no less essential than the power to borrow money, and, in preserving the latter it is not necessary to cripple the former by extending the constitutional exemption of taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' * * *"

> "Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor in performing services for the United States. 'Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally,

taxation of the means.' *Thomson v. Union P. R. Co.*, 9 Wall. 579, 597, 19 L. ed., (76 U. S.) 792, 798.

"In *Union Pacific R. R. v. Peniston*, 18 Wall. 5, (85 U. S. 787, 791, 795) the Court said: 'It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.'

(And from the dissenting opinion of Justice Bradley in the Peniston case the Court quotes as pertinent): "'Wherein (when) the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops or supplies, or for building ships or works for government use, (In those cases) the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government.

"Taxation by either the state or the federal government affects in some measure the cost of opera-

> tion of the other. As 'neither government may destroy the other, or control in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax * * * or the appropriate exercise of the functions of the government affected by it.' *Metcalf v. Mitchell, supra,* (269 U. S. 523, 524.)

The Court was aided in *Draco* in its reversal of the previous broad interpretation of immunity, by the excellent brief of the then Solicitor General, Stanley Reed (now retired Justice Reed) and the then Attorney General Homer Cummings, who filed a brief *amicus curiae* which advocated that (at pages 3, 25, 44):

> "We ask, therefore, that this Court permit those who contract with the Government to be subjected to the normal tax burdens of those who contract with private persons. The validity of the tax should be tested only by the presence or absence of a discrimination against those dealing with the sovereign. And the decisions of this Court indicate the readiness with which the sovereign can obtain protection against a discriminatory tax, which alone contains any threat to our dual system of government."
>
> "The exemption of contractors would ordinarily be reflected in savings to the United States, so that the United States would be able to purchase a contractor's services at less cost than could any private person. The question thus becomes whether the maintenance of our dual system requires that those who do business with the Federal Government should be exempt from a general tax, there-

by in effect obtaining free benefits from the State, in order that those free benefits may be passed on to the Federal Government. We think the question bears its own answer."

"We think it evident that once we pass beyond the simple criterion of whether or not the Government itself must pay the (non-distriminatory) tax, and subject itself to the tax collection machinery of the State, there can be no satisfactory distinction between the types of taxes which are sought to be imposed upon the private persons who deal with the sovereign. Since the question turns solely upon the effect upon the sovereign, and since all taxes, in varying degrees, have this effect, we submit that the doctrine can have a rational and fair application only if all of these taxes are held to be within the taxing power of the Government, whether it be the Nation or the State. The attempt to distinguish between the varying types of taxes imposed on private persons, according as they interfere with the sovereign, is to perpetuate a rule which has proved to be unsatisfactory and inconsistent."

And again this Court in its opinion and the concurring opinion of Justice Frankfurter, in *Graves v. New York, supra*, 306 U. S. 466, 483, reasserted guiding principles of and limitations of the implied immunity doctrine:

"* * *, in Helvering v. Mountain Producers Corp., 303 U. S. 376, 82 L. Ed. 907, 58 S. Ct. 623, supra, * * * It was pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the gov-

ernment in whose name the immunity is claimed. See *Metcalf & Eddy v. Mitchell, supra* (269 U. S. 523, 524, 70 L. Ed. 392, 393, 46 S. Ct. 172); *James v. Dravo Contracting Co., supra* (302 U. S. 156-158, 82 L. Ed. 170, 171, 58 S. Ct. 208, 114 A. L. R. 318)."

At pp. 488-491, (Justice Frankfurter concurring):

"Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

The arguments upon which *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, rested, had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *M'Culloch v. Maryland*. Partly as a flourish in rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' Id. at p. 431. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion of *M'Culloch v. Maryland*.

> All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.' The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223, 72 L. Ed. 857, 859, 48 S. Ct. 451, 56 A. L. R. 583 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent. * * * "In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined."

And in *Oklahoma Tax Commission v. Texas Co.*, *supra*, 336 U. S. 342, 363-366, this Court further emphasized the correct application of the immunity doctrine as being concerned with substance and direct effects and not with merely theoretical conceptions of the interference with the function of Government.

> "Moreover the burdens of the taxes here, if any of a character likely to interfere with respondents in carrying out the terms of their leases, are as appropriately to be judged by regard * * * to substance and direct effects, and as inappropriately to be determined by merely theoretical conceptions of interference with the functions of government, as were those in the Mountain Producers Case.

> The Mountain Producers Case *(Helvering v. Mountain Producers, supra)* was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant wielding of the exempting process from tax to tax to tax.
>
> Since that decision, as we have noted, the process has been reversed in direction. True, intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

Two opinions of this Court since *Draco*, that is, *United States v. Allegheny County*, 322 U. S. 174 and *Kern-Limerick v. Scurlock*, 347 U. S. 110, are, in our humble opinion, out of harmony with the correct principles of and limitations laid down by *M'Culloch, Thomson, Peniston, Draco* and the other decisions heretofore discussed and cannot be distinguished on principle from these cases, although this Court has made distinctions such as in *Esso* which upon analysis are purely technical distinctions having no relation to the fundamental principles of immunity. We will show that the facts in this case also distinguish it from *Allegheny* and *Kern-Limerick* but we contend that these taxes should be validated not only for that reason but also because they are within the limitations of the correct immunity philosophy, as expressed in the cases heretofore discussed.

Contract Created Immunity Not in Accord With Fundamental Principle

In considering the tax here involved, a distinction should be made between the traditional constitutional tax immunity of the Government and the immunity here attempted to be created by contractual language alone.

The fundamental principle of immunity exists independent of contract and is implied because any tax levied directly upon the Government, its institutions or its property is a direct imposition against the sovereign, the incidence of such a levy falling on the United States and not on a private individual or corporation.

The contract-created immunity here claimed is an artifice and could not exist independent of language devised in most instances for the sole purpose of creating an immunity therefrom non-existent (either by implication or Congressional Act).

The question here, as in *Draco, King and Boozer*, etc., is: Is the direct burden or legal incidence of the tax in this case, within the doctrine of implied constitutional immunity, upon the Government or upon the independent contractor? In answering that question the nature and impact of the tax, the liability or responsibility for payment thereof, the protection of any Government interests involved as well as whether or not the substance and direct effect of this tax constitute an interference with any means of Government operations, are pertinent.

B. Nature and Impact of the Tax

On January 1, 1952 appellee had in its possession personal property of the value of $12,183,180 (of which value $2,043,670, it is here claimed, represented property of the United States). Appellee was listed on a personal prop-

erty assessment roll (Appendix, p. 29a) R. 103 as the "owner or taxpayer" under the provisions of the *Detroit Charter* and *State Law (Compiled Laws of Michigan, 1948*, Sec. 211.1 *et seq.* Appendix p. 9a), which *Charter* in its pertinent parts, provides (*Title VI, Chapter II*):

> "Section 1. All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. * * * All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not."
>
> "Sec. 7. After the assessment rolls shall have been fully and finally confirmed, it shall, as herein provided, be the duty of the board of assessors to cause the amount of all taxes, in dollars and cents, authorized to be assessed and collected in each year, to be ratably assessed to each person named or lots described, upon and according to the aggregate valuation which such person or lots shall have been assessed in said assessment rolls. Such ratable assessment shall be entered in a book prepared for that purpose to be known as the tax roll for each district, in a column showing the amount of city taxes assessed to each person or lot in each year. Such tax rolls shall contain columns for the names and addresses of all persons assessed hereunder. When said tax rolls shall have been completed, the board shall deliver the same to the controller, who shall cause the same to be delivered to the city treasurer on the first day of July, take his receipt therefor and charge him therewith. All city taxes shall become a debt against the owner from the time of the listing of property for assessment by the board of assessors."

Section 1, Chapter IV, Title VI of the Charter of the City of Detroit, provides:

"All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed. The owners or occupants or parties in interest to any real estate assessed hereunder shall be liable to pay such taxes, and all assessments levied in accordance herewith. The owners or persons in possession of any personal property shall pay all taxes assessed thereon."

Procedure for Assessment and Levy of Personal Property Tax Under Charter, Etc.

The substance of the procedure under the *Charter* and *State law* in the levy of a personal property tax is to lay (levy) a tax on the owner or person in possession (the taxpayer named on the roll, in this instance, the appellee) of personal property. (Sec. 7, Ch. II, Title VI, Charter above.) This contrasts with procedure for levy of an ad valorem real property tax condemned in *United States v. Allegheny*, 322 U. S. 174, as laying a tax on Government property.

The first step in our assessment-taxation process under the *Charter* and comparable *State laws* is an assessment (valuation or appraisal) of the property owned or in the possession of the taxpayer, at its true cash value as provided in *Section 1, Chapter II, Title VI of the Charter* above. The word "assessment" as there used means the appraisal or valuation.

This listing and valuing is only the first step and in itself fixes no liability and lays no charge upon either person or property but is preliminary to and serves as an essential basis for the apportionment or levy of a personal property tax to obtain from the taxpayer named which here is appellee, its proportionate share of the pub-

lic revennes required to be raised by taxation by the City and County."

In *Flanigan v. Police Jury*, 82 So. 722, the Supreme Court of Louisiana said at page 726:

> "* * * The words 'assess' and 'assessment' have a broad or narrow meaning according to the sense or connection in which they are used. Sometimes they mean a listing and valuing of property, while at others they include the calculation of the rate and amount of taxes thereon. In the present case we believe that by 'assessed valuation' the framers of the Constitution meant only the listing and valuing of the property as a basis upon which taxes were to be collected, and that they did not intend to include in that term the further process of the calculation of the amount to be paid by the taxpayers. In other words; the value written into the roll by the assessor to represent the property, and the one factor in the process of taxation which remains constant for all purposes, save to the extent that it may be modified by the police jury as a board of reviewers, or by the board of state affairs, in the exercise of its powers of review, is the actual value fixed by the board."

Cooley on Taxation, Vol. 1, 4th Ed., Section 24, reads as follows (p. 93):

> "The individual and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be legally in default in paying at the time stipulated by law."

In *Cooley on Taxation*, Vol. 3, 4th Ed., Sec. 1044, the word "assessment" is defined:

> "The word 'assessment,' as used in the decisions and statutes, has various meanings. Properly

speaking it does not include the levy of taxes although sometimes the words 'assess,' 'assessed,' or 'assessment' are used in a statute as including both the levy and the assessment. An assessment, strictly speaking, is an official estimate of the sums which are to constitutee the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not, therefore, of itself lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment. * * *"

Personal Property Tax Is Charge Against Person Named on Roll

Only the procedure in *Section 7, Chapter II, Title VI of the Charter* above fixes liability and makes the charge or levy of the tax when the tax roll is certified and the amounts of all taxes are ratably assessed upon and according to the aggregate valuation *which such person* (or lots) *shall have been assessed* in said assessment rolls.

The tax charge or levy is here made or fixed to or against the person named in the assessment roll in the case of personal property assessments and to or against the lots, in the case of real property, described in said assessment roll.*

---

*In *Kelly v. Herrall*, 20 Fed. 364, the Court said at page 367:

"In Cooley, Tax'n, the learned author (383, note) suggests that too much importance has been attached to this idea that a proceeding for the assessment and levy of a tax is 'hostile' to the tax-payer, and adds the following judicious and sensible comments:

'The proceedings in the assessment of a tax are not, in any proper sense, hostile to the citizen. They are, on the other hand, proceedings necessary and indispensable to the determination of the exact share which each resident or property owner ought to take, and may and ought to be supposed desirous of taking, in

(Continued on next page)

Only in *Section 7, Ch. II, Title VI of the Charter* above is the individual tax obligation fixed, and made a charge upon the person in the case of personal property taxes and upon the lots in the case of real property taxes being otherwise inchoate and for an undetermined amount prior thereto *(The West Michigan Lumber Co. v. James Dean,* 73 Mich. 459, 41 N. W. 503.**

(Continued from preceding page)

> meeting the public necessity for a revenue; proceedings which the willingness of the tax-payer cannot dispense with, and which only become hostile when the duty to pay, once fixed, fails to be performed by payment. Then, and then only, do the steps taken by the government assume a compulsory form. Until then, the reasonable presumption is that government and tax-payer will act together in harmony, and that the latter will meet his obligation to pay as soon as the former has performed its duty in determining the share to be paid.'"

It would appear that the Courts have attached too much importance to the mere proceedings for assessment in transmuting that alone into hostile action against the government, according to Justice Cooley.

**In *The West Michigan Lumber Company v. James Dean,* the Court said:

> "The statute (Act No. 153, Laws of 1885, §26) provides that the supervisor, after the roll has been certified as directed by the board of supervisors, shall proceed to assess the taxes apportioned to his township, and extend the same on his roll; and the taxes thus assessed shall become at once a debt to the township from the persons to whom they are assessed; and all personal taxes shall also be a lien on all personal property of such persons so assessed from and after December 1, except where such property is sold in the regular course of business.
>
> The next section then provides that the supervisor shall prepare a copy of the assessment roll, with the taxes assessed as hereinbefore provided, and annex thereto a warrant signed by him, commanding the township treasurer to collect the taxes; and this warrant authorizes the treasurer, in case of neglect or refusal of any person assessed to pay, to seize the goods and chattels of such person, and sell the same therefor. The copy of the roll, with the warrant

(Continued on next page)

Significantly the language of *Section 7* indicates a distinction between liability for taxes in the case of personal property as opposed to real property. The assessment or apportionment is to the person in the case of personal property and to the lots in the case of real property. Also the tax roll is required to have a column showing the amount of city taxes assessed or levied to each person or lot in each year. This confirms our conclusion that the form and substance of our personal property tax is essentially a form of personal taxation, using the property only as a basis according to value for such taxation. See *Opinions, Attorney General of Michigan,** 1928-30, p. 176 at p. 177:

> "In considering these provisions it should be borne in mind that a personal property tax is distinguished from a real estate tax in that the former is an assessment against the person, while the latter is against the property. Thus, in *Lucking v. Ballantine*, 132 Mich. 584, the court said:
>
> 'In the case of a tax on land, it may be stated as a general proposition that the land, and not the owner, is taxed. Purchasers and all persons interested in land understand this, and must pay the taxes as a condition of enjoying their property. It is otherwise with personal property. It has always been the policy of the law—supposedly in the interest of

---

(Continued from preceding page)

annexed, is designated as the 'tax roll.' *The liability of the party assessed to pay the tax becomes fixed when the tax is extended upon the original assessment roll.*'

The taxes in this case assessed against the plaintiff became a debt to the township when the roll was completed, and remained a debt which it was the duty of plaintiff to pay. * * *" (Italics ours.)

*Appended in full, Appendix p. 24a.

trade—to make personal property easily transferable, and to secure to purchasers and mortgagees the entire title of the seller and mortgagor.'"

Restated in *Opinions of Attorney General of Michigan*, 1940, p. 524.

See also *Danitz v. Pick Co.*, 244 Mich. 55, 216 N. W. 382, wherein the Supreme Court of Michigan said:

"The Lucking case has been the law of this state since 1903. It states a rule of property by which purchasers may be guided."

In the case of personal property taxes, this levy or charge can only be made to the person named in the assessment roll as there is no provision in Section 7 for such levy or charge to be made against the personal property.

The fact that a lien is provided for in other sections of the *Charter* does not alter the fact that the assessment in the sense of it being a charge or levy is only against the person in the case of a personal property assessment. (See later discussion of effect of lien.)

The property (personal) is never used in the assessment procedure except as a basis according to its valuation for the taxes levied and collected and such levy is in *personam* as contrasted to the real property levy which is *in rem*.

Furthermore the *Charter* (Sec. 2, Chap. II, Title VI, Appendix p. 14a) provides that in the case of a real property assessment a mistake in naming the owner will not vitiate the assessment or tax. In the case of a personal property assessment such a mistake can be fatal to collection of the tax.

Detroit Trust Co. v. Detroit, 269 Mich. 81, 256 N. W. 811.

C. Liability or Responsibility for Payment of Tax

Under the *Charter* (Sec. 26, Ch. IV, Title VI, Appendix p. 179) and *State Laws* these taxes, if unpaid, can be collected by suit in assumpsit for the collection of the debt against the "person or corporation refusing or neglecting to pay such taxes",—which here could only be Murray, the "taxpayer" named on the roll.

The Supreme Court of Michigan has in several cases sustained the right of the City under its Charter to assess personal property taxes against the person in possession, rather than the owner, when it so elects. In that event it has authority to collect the personal property taxes, if unpaid, by suit in assumpsit against such person in possession, and only against such person.

Detroit Shipbuilding Company v. City of Detroit, 228 Mich. 145, 199 N. W. 645, 135 A. L. R. 597;
City of Detroit v. Gray, 314 Mich. 516, 22 N. W. 2d 771;*

*At page 526 of 314 Mich.:

"Plaintiffs urge that household furniture is properly assessed for personal property taxes to the husband although title to the same has been transferred to his wife.

Title 6, chap. 4, §1, of the Charter of the City of Detroit, provides in part, as follows:

'The owners or persons in possession of any personal property shall pay all taxes assessed thereon.

In the case of *Detroit Shipbuilding Co. v. City of Detroit*, 228 Mich. 145, we held that personal property owned by a foreign corporation, but in the possession of a Detroit firm, was taxable to the Detroit firm."

See also *Carstairs v. Cochran*, 193 U. S. 11; *Detroit Trust Co. v. Detroit*, 269 Mich. 81, 256 N. W. 811.

Another example of the personal nature of a personal property tax is that an executor or administrator of an estate becomes personally liable for such a tax assessed against him while the property is in his hands before distribution. A suit may be brought against him personally for collection of the tax as a debt but not against the property of deceased in his hands. And he remains liable under Michigan law after distribution unless he notifies the treasurer of such distribution.

City of Detroit v. Stafford, 320 Mich. 6; 30 N. W. 2nd 410.

See Opinions Atty. Gen. of Mich. 1928-30, p. 176, Appendix p. 24a.

Provision for Lien Does Not Change Character of Assessment and Is Not Before the Court

The character of the tax is not changed from one *in personam* to one *in rem* by the fact that the *Charter* and the *State Law* provide for a lien (*Charter, Title VI, Chapter II, Section 26* and *Section 1*, Appendix 14a).

In *Land O'Lakes Dairy Co. v. Wadena County*, 229 Minn. 263, 39 N. W. 2d 164, the Supreme Court of Minnesota said of a similar tax (p. 173):

"In *City of Detroit v. Stafford, supra*, it is stated (pp. 6, 7, syllabus):

"An executor or administrator is personally liable for taxes on personal property accruing against an estate after death of decedent and prior to giving notice to tax-collecting authorities of distribution, hence enforcement of payment is against him personally and not against the property of the deceased in his hands (1 Comp. Laws 1929, §3429, as amended by Act No. 38, Pub. Acts 1933 (1st Ex. Sess.); §§3401, 3402; Detroit Charter, title 6, chap. 4, §§1, 26)."

"Personal property taxes, being only *in personam* and not against the property, have no effect upon the property, except where the state attempts to enforce its lien therefor against the property. The taxpayer's tax liability and the State's lien rights against the particular property involve separate questions. At this stage of the proceedings only the liability of the taxpayer for the tax is involved. Since the tax may be collected out of the taxpayer's other property, it may never become necessary to resort to the property on the ownership of which the tax is based. The question is whether one using property, upon which the government holds a mortgage, is immune upon federal grounds from a personal property tax imposed upon him *in personam*. We think that this question is answered emphatically in the negative by the *Oklahoma Tax Comm. case (Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342, 92 L. Ed. 721) supra, and the numerous decisions of the Supreme Court of the United States there cited."

This Court affirmed the decision in Land O'Lakes upholding the taxes involved, as follows (338 U. S. 897):

"Dec. 12, 1949. *Per Curiam*. The motion to affirm is granted and the judgment is affirmed. *N. P. A. Inc. v. Minnesota*, 327 U. S. 558, 90 L. Ed. 851, 66 S. Ct. 749; *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342, 93 L. Ed. 721, 69 S. Ct. 561."

See also:

Northern National Bank v. Northern Bank, 244 Minn. 202, 70 N. W. 2d 118, reaffirming *Land O'Lakes, supra*, at pp. 125-6, 70 N. W.

See also *Reynolds Aluminum Co. v. Multnomah County*, 206 Or. 602 287 P. 2d 921, wherein the Supreme Court of Oregon said (p. 929):

"Section 110.312, O. C. L. A., as amended, supra, prescribed *to whom* personal property may be assessed, as follows:

"* * * Personal property may be assessed in the name of the owner *or any person having possession or control* thereof.' (Italics ours.)

"In the light of these statutes, it is manifest that the assessment in this case was properly made by defendants. *We are in no way concerned with the enforcement of the tax lien; that is not an issue in this case. Yet it might be well to point out that ample provision is made by statute for the collection of the tax without in any manner affecting any right or lien of the United States.*" (Italics ours.)

That provisions in tax statutes for a lien on property, even though it be government property, do not affect the validity of the tax is declared by this Court in *West v. Oklahoma Tax Comm.*: 334 U. S. 717 at pp. 725-6. See also *S. R. A. v. Minn.*; *New Brunswick v. U. S.* and *U. S. v. Alabama*, discussed *infra*.

The Incident or Direct Burden of This Tax Is on the Person. Here Appellee

To summarize, as noted in Minnesota, so it is in Michigan, and in this case—the personal property tax is *in personam* and is regarded as a form of personal taxation. No lien is being enforced nor need or could it be (*United States v. Alabama*, 313 U. S. 273, *supra*). The tax, if unpaid, could be collected by suit against the taxpayer (Appellee) or out of appellee's other property. In this proceeding, only the liability of the taxpayer for the tax is involved and furthermore the taxes having been paid, any lien has been extinguished.

We submit that this form of taxation as provided by the *Michigan Statutes* and the *City Charter* for the assess-

ment and collection of personal property taxes is regarded as a form of personal taxation and that the substance of the procedures under the law is to lay a personal tax upon the person named in the assessment roll, whether it be the owner or the person in possession, upon and according to the value of the personal property owned or in the possession of such taxpayer on tax day. *(City Charter, Section 7, Chapter II, Title VI, supra.)*

The direct burden or incidence of these taxes is, therefore, upon and against the independent contractor, appellee. There is no possible interference with the operations of the Federal Government either by the assessment or any possible collection of the tax in case it were unpaid, all within the principles laid down in *M'Culloch, supra*, and *Draco, supra*, and the other cited decisions of this Court which follow the direct burden and incidence rule.

The personal character of the assessment and obligation to pay the taxes and the collection thereof as being against the person in possession, when he is the taxpayer named, is supported both by the assessment itself, the law, and decisions of Michigan's highest Court fixing the incidence of the tax against the taxpayer named. Such determinations being final, (See *Federal Land Bank v. Bismarck*, 314 U. S. 95; *S. R. A. v. Minn.; Alabama v. King-Boozer, supra*) it must follow that whatever the United States' title may be to the materials in question, the direct burden or incidence of the assessment, the obligation to pay the tax and the collection thereof, is to or against appellee and only appellee, a private contractor.

Federal Government's Interests Protected

To protect the claimed title of the United States to certain of the personal property in appellee's possession, the assessors placed on the roll the words "assessed subject to prior rights of Federal Government". (See *Pet. of Edw. Hines Lumber Co.*, 196 Or. 420; 248 P. 2d 720, 723) wherein the Supreme Court of Oregon said:

> "* * * the tax in question is directed solely against the interest of the company in the whole value of the logs, the rights of the government being unaffected. The assessment roll itself clearly states that the logs are assessed 'subject to the prior rights of the Federal Government,' just as were the lands assessed in the S. R. A. case 'subject to the prior rights of the Federal Government.'
>
> Government immunity from state taxation is premised on the proposition that an added burden would be imposed upon the government if state taxation were permitted. By § 110-839, O. C. L. A., taxes levied on personal property becomes a debt due and owing from the owner of such personal property, and by ch. 389, Oregon Laws 1941, such personal property taxes may become a lien on the real property so that the tax on the logs in question could be collected from the company without in any wise interfering with the government's rights in the premises."

To the same effect and using the *Hines case* as authority, see *Reynolds Aluminum Co. v. Multnomah County*, *supra*, p. 104.

So that whatever interest the United States might have in this property was protected by this language in addition to the protection afforded by law without such language (*United States v. Alabama*, 313 U. S. 274; *S. R. A.*

v. Minnesota, 327 U. S. 558; *New Brunswick v. United States*, 276 U. S. 549.)*

---

*In the *S. R. A. case* the State had protected the Government's "paramount rights" in property by making the levy and judgment for taxes "subject to fee title remaining in the United States of America" (See *Petition of S. R. A., Inc.*, 7 N. W. 2d 484, 486). This Court said (pp. 857-8, 90 L. Ed. 327 U. S. 557, 565-566):

> "The nub of this case, that is the immunity from state taxation of property to which the United States holds legal title, remains. *Minnesota took care to leave unassessed whatever interest the United States holds. The levy and judgment was 'subject to fee title remaining in the United States of America.'* 219 Minn. at 496, 18 N. W. 2d 446. *Although Minnesota real estate taxes are assessed on the parcel of land as a 'unitary item' including 'all rights and privileges,' the state does not claim that a tax sale will divest the fee title of the United States.* 213 Minn. at 499, 7 N. W. 2d 487, 490. *Apparently the state is of the view that the equitable interest alone may be sold under its laws, leaving the fee of the United States in its position of priority over any interests which may be transferred by the tax sale.* 219 Minn. at 513, 18 N. W. 2d 453. *Such a construction of the state law is binding upon this Court. It does not impinge upon federal rights. So long as that situation exists, the determination of the state cannot be challenged here.* The possibility of repossession by the United States is not enough to block a tax sale in which the paramount rights of the United States are protected. *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 381, 382, 49 L. ed. 242, 244, 245, 25 S. Ct. 50; *New Brunswick v. United States*, 276 U. S. 547, 556, 72 L. ed. 693, 698, 48 S. Ct. 371; *United States v. Alabama*, 313 U. S. 274, 282, 85 L. ed. 1327, 1332, 61 S. Ct. 1011." (Italics ours.)

And this Court said in *United States v. Alabama*, *supra* (pp. 1332, 1333, 85 L. Ed. 313 U. S. 273, 281-282):

> "Our present inquiry is whether, assuming the validity of the state statute creating a lien as of October 1, 1936, as against other subsequent purchasers, it should be deemed invalid as against the United States. *The question is not whether such a lien could be enforced against the United States. The fact that the United States had taken title and that proceedings could not be taken against the United States without its consent would protect it against such enforcement. But that immunity would not be predicated upon the invalidity of the lien.* * * * (Italics ours.)

A proceeding against property in which the United States has an interest is a suit against the United States. *The Siren*, 7 Wall.

(Continued on next page)

The real significance of these decisions is the concern of this Court that whatever interests the Government may have in the property which was the subject of taxation, has been protected from the enforcement of the lien, and the court's unconcern about the tax levy as the assessment itself being on the entire property including the Government's interest therein.

(Continued from preceding page)

(U. S.) 152, 1, 4, 19 L. ed. 129, 130). The United States was an indispensable party to proceedings for the sale of the lands, and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void. *Minnesota v. United States*, 305 U. S. 382, 386, 83 L. ed. 235, 240, 59 S. Ct. 292."

And in the case of *New Brunswick v. United States*, *supra* (276 U. S. 547, 555, 556).

"It is unquestioned that so long as the corporation (United States Housing Corporation) held title to the lots as an instrumentality of the United States and *solely for its use and benefit*, they were not subject to taxation by the city. *Clallam County v. United States*, 263 U. S. 341, 344, 68 L. ed. 328, 331, 44 Sup. Ct. Rep. 121. * * *

We see no reason, however, if the New Jersey law permits, why the city may not assess taxes against the purchasers upon the entire value of the lots and enforce collection thereof by sale of their interests in the property. With that the corporation and the United States have no concern. But it is plain, under the doctrine of the Clallam County Case, that the city is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the corporation as security for the payment of the unpaid purchase money, whether as an incident to the retention of the legal title or as a reserved lien or as a contract right to mortgages. That interest, being held by the corporation *for the benefit* of the United States, is paramount to the taxing power of the state and cannot be subjected by the city to sale for taxes.

We conclude that, although the city should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, as equitable owners, it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens and interests in the lots, retained and held by the corporation as security for the unpaid purchase moneys, are expressly excluded from such sales, and they are made, by express terms, subject to all such prior rights, liens and interests. This, we think, will meet the equities of the case as between the corporation and the city, and fully protect the paramount right of the United States." (Italics ours.)

All of the requirements for protection of the Government's interest in the property here involved have been met exactly as they were in the foregoing cases.

This Court's statement in *New Brunswick, supra*, (p. 555) 276 U. S. that "so long as the corporation held title to the lots as an instrumentality of the United States and *solely for its use and benefit* they were not subject to taxation by the City (citing *Clallam County v. United States*)" is particularly relevant to the facts here. We have and will show that whatever title the United States may have in the materials here involved, such title is not being "*held solely for its use and benefit*" but instead for the use and benefit of appellee, a private contractor.

With the Government and its property actually immune from any consequences of the taxes such as personal liability or levy or sale of the property, these taxes constitute no more interference with United States operations than if they were payments-in-lieu of taxes such as the President's Commission on Intergovernmental Relations has recommended be paid on this type of property.

For Report of this Commission See *Hearings Before the Committee on Governmental Operations, United States Senate, 84th Congress, 1st Session, July 25, 1955, Appendix II, p. 200.*

The only immunity which the appellee and Government then is here concerned with is exemption from payment of taxes, such exemption being only immunity from the economic burden. This Court no longer considers such a burden sufficient to justify application of the immunity doctrine. *James v. Dravo; Graves v. New York; Alabama v. King-Boozer, supra.*

As the Court said in *Graves* (306 U. S. p. 487):

> "The burden (economic), so far as it can be said to exist or to affect the government in any indirect

or incidental way, is one which the Constitution presupposes."

Real Interests Should Be Determined Regardless of Labels

Labeling this tax as a personal property tax or the Government as title holder of the property should not foreclose this Court from ascertaining the true nature of the tax and of the Government's interests in the property.

In *Offutt Housing Co. v. Sarpy*, 351 U. S. 253, this Court said at p. 261:

> "Petitioner also argues that the state tax, measured by the full value of the buildings and improvements, is not on the 'lessee's interest' but is on the full value of property owned by the Government. Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interests created and so does not solve the problem. See *Millinery Center Bldg. Corp. v. Commissioner*, 350 U. S. 456, 100 L. Ed. 545, 76 S. Ct. 493."

In fact, the title taken by the Government in that case was much more realistic than the title it purports to take here. (See discussion under question II this brief.) See description of Government's interests in *Offutt*, *supra*, by Justice Douglas, dissenting, with Justices Reed, Burton and Harlan.*

---

*Pp. 264-265 U. S.:

"The Government's stake here cannot be measured by bare legal title. It has vast and important interest in these projects. It owns the controlling stock in the lessee. It prescribes the maximum rentals. It determines what persons may occupy the living quarters. It assumes most of the financial risks of these housing

(Continued on next page)

The language of the majority opinion in *Offutt* is at variance with the statement in *Kern-Limerick, supra*, (347 U. S. 110, 122-123):

> "* * * since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself."

and, in effect, is in harmony with the language of the dissenting opinion of Justice Black, Chief Justice Warren and Justice Douglas in that case, supra, when they said (pp. 126, 127):

> "What was important in King & Boozer was the substance of the transaction and the nature of the economic burden on the United States. On these two paramount issues it is impossible to distinguish the present case.
>
> The concepts 'title,' 'agency,' and 'obligation to pay' are no basis for this constitutional adjudication. Today they are used to permit any government functionary to draw the constitutional line by changing a few words in a contract. When the Congress deliberates over this problem, as it often has, it does not worry about the passing of title or other legal technicalities. The Congress debates whether

---

(Continued from preceding page)

projects by insuring the mortgagees. It provides police and fire protection, sewerage and water service, and access roads. The United States is not a mere lessor who, having leased the property, allows it to be managed by the lessee. The great decisions as to management are made by the Government. The lessee is, indeed, a managing agent. * * *."

as a matter of policy, including the need of the States for revenue, the holder of a cost-plus government contract should be immune from state taxation.

Alabama v. King & Boozer and the cases it followed were a long step forward from the time when a State's power to tax was nullified whenever the federal treasury was even remotely affected. We should not take this equally long step backwards. We should hold that, until the Congress says differently, the States are free to tax all sales to cost-plus government contractors. We should dispense with fruitless talk of agency, titles, and obligations to pay. The *legal incidence* of a tax is a matter for the States to determine. We should decide today, as we did more than a decade ago, that a tax on a contractor for goods he uses is constitutional, even though the *economic burden* falls on the Federal Government."

D. Substance and Effect of This Tax Do Not Constitute Interference With Operations of Government

Can the materials here involved be construed as "means employed by the Government of the Union for the execution of its powers" as this Court has defined and now understands the phrase?

The airplane and engines, sub-assemblies and parts, contracted for with Kaiser and Wright, when completed, inspected, accepted and delivered to the Government, then may be "means employed by the Government of the Union for the execution of its powers" for national defense. But, if the Government has not contracted for the purchase of the materials that will constitute those planes, are those materials in any sense the "means" merely as materials?

There is no evidence here that the Government so considered them.

The claims of appellee and the Government rest entirely on the contention that title to such materials was acquired by the Government by virtue of a contract provision and that is sufficient, *ipso facto*, to immunize them from taxation. There is no claim, nor could there be, that the contracts with appellee contemplated the purchase by the Government of any of the materials in controversy, nor did they contemplate the purchase of the planes, etc. in portions. They (the materials) were acquired or produced by appellee for the sole use of appellee in performance of its contracts with Kaiser and Wright (R. 98). The enjoyment of the entire worth of these consumable materials and work in process, as such, is, therefore, appellee's until delivery of its finished products. See *Offutt Housing Co. v. Sarpy*, *supra*, p. 261 of 351 U. S.

The Government set out to buy airplanes and airplane engines, assemblies and parts and contracted with Kaiser and with Wright to produce them, permitting those firms subsequently to sub-contract for production of certain items for the assembly of those planes and engines, assemblies and parts.

The Government was not buying nuts and bolts or rubber or steel or other materials and supplies or inventories from the prime contractors and was buying nothing at all from appellee either then or afterwards.

Such were the prime contracts as originally entered into by letters of intent, etc. (R. 142, 189).

Later, both Kaiser and Wright received permission from the Government to sublet parts of the work to appellee,

such original sub-contracts being between Kaiser and Wright and appellee respectively, the Government not being a party thereto and by endorsement thereon (R. 172, 221) being entirely free of any obligation thereunder.

Kaiser and Wright (not appellee) were still obligated to the Government to produce finished planes and engines, etc., but appellee's sub-contracts did provide for the Government's right of inspection, etc. of the latter's production and other Government protections as were provided in the prime contracts. Still, there is no evident intent by the Government to purchase any materials such as here involved, separate from the planes, engines, assemblies or parts, etc., that they had ordered from Kaiser and Wright.

And still, at this point, no immunity may be claimed from taxation (no title of any kind being yet acquired by the Government, no partial payment having yet been made to effectuate it) of anything but the completed and delivered products ordered.

Did the Government suddenly decide that these materials (separate from the planes and engines) had become so essential to national defense that they required protection from adverse action or influence by the State or individuals?

No amendment was ever made to these contracts so that they would become contracts of purchase of materials, rather than planes and engines, assemblies and parts, nor were they amended so that the Government would take title to such materials as such, separate from the completed planes or engines, absent partial payments being requested, nor did they, at any time, constitute Kaiser or Wright as purchasing agents of the Government in their acquisition,

as in *Kern-Limerick and United States v. Scarlock, supra.** The same facts concerning appellee's sub-contracts are even more compelling to these conclusions, there also being no privity of contract between appellee and the United States.

Government Acquisition of Title Dependent on Contractor's Request for Partial Payment

If, up to this point, these materials were not *means employed by the Government of the Union for the execution of its powers*, and if up to now any taxes levied against appellee as "the person in possession" thereof would not "retard, impede, burden or in any manner control the operations of the general Government," under the doctrine of Chief Justice Marshall, could they now or later suddenly change their character so that they became such *means*, so that any taxation would "retard, impede, burden or in any manner control the operations of * * * the general Government," and, if so, what compelling reason was there for such change and by what magic wand were they so transformed?

---

*The majority opinion of this Court in *Kern-Limerick, supra*, held that, because the contract there involved made the contractor the agent of the Government in the purchase of materials that they were purchased for the Government's account and paid for by the Government on voucher and the contractor was the purchasing agent of the Government, the incidence of a sales tax (which, under Arkansas law made the purchaser responsible for the tax) was therefore on the Government and the tax invalid. (The fact that the Government took title on delivery to the contractor was held of no significance in *Alabama v. King & Boozer* or in *Kern-Limerick*.

The opposite of that situation is true here—where the contractor purchases for himself, on his own credit and pays for the materials himself, the Government assuming no responsibility whatever in the transaction, nor is the contractor the Government's purchasing agent at any time. The facts here are analogous to the facts in *Alabama v. King and Boozer, supra*, appellee's only relation contractually with the Government being through its contracts with the prime contractors and that only for the manufacture of parts or assemblies. In fact, any obligation of the Government to appellee is specifically denied by endorsement on these sub-contracts (R. 221 and 172).

The simple fact (having nothing to do with Government protection, either from local taxes, regulations, loss of property or otherwise) is that appellee initiated the request for inclusion of these partial payment clauses in its subcontracts, and in the Kaiser prime contract by Amendment (R. 161) and made requests for payments thereafter, presumably for financing purposes.

Appellee was therefore in the position of being able to invoke Governmental immunity for its materials by a mere request for and receipt of a partial payment from the prime contractor. This Court, in *Graves v. New York*, 306 U. S. 466 said at p. 483:

> "Where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed."

Under the partial payment title-transfer terms of these contracts the Government could never, on its own initiative, take title to materials or work in process or anything but the finished products nor was the Government purchasing these materials as this Court held it did in *Kern Limerick* and *United States v. Scurlock*, 347 U. S. 110, and *United States v. Allegheny County*, 322 U. S. 174.

If the Government then could not take title unless or until appellee requested money and if it didn't ask for any the Goverment never could acquire title, what other conclusion can be drawn than that the only purpose of such title transfer was for security of the payments made?

If by mere acquisition of title under this clause, these materials became "means of operation of the government," then they could never achieve that status until and unless the contractor invoked his right to request partial payment.

If security of the materials was needed, other than for financial reasons, why was the Government helpless to get that security in the form of "title" unless and until appellee asked for such partial payment?

As further evidence that security for partial payments was the sole purpose of the title transfer provision is the fact that under the liquidation of partial payments clause in the sub-contract (R. 176) (discussed under Question II) upon completion and delivery of assemblies or parts equal in value to the partial payments made; title to all materials, work in process, etc. still in the contractors' hands or after acquired by it vests (re-vests) in the contractor. Do these materials and work in process then change character again from means of government operation to more nuts and bolts and steel, etc., not needing protection from hostile local action or taxation?

The answer is self-evident.

Government Not Interested in Obtaining Title to Materials Absent Partial Payment.

Furthermore, if transfer of title of these materials was necessary for the protection of the Government from any adverse actions against it by anyone, no one in the Government was apparently too concerned. It took several months to process the request of appellee made to Wright, for instance, to the point of actually making a partial payment on the Wright contract and then it was made on December 31, 1951, nine months after appellee had entered into its sub-contracts. (Co-incidentally, tax day in Detroit is January 1st!)

And what about the materials in the hands of those Government contractors who get no partial payments and consequently the United States gets no title?

Many of them are and were producing parts for planes the same as appellee was—(some in Detroit).

Are these contractors' materials any the less "means" entitled to freedom from State control of taxation than appellee's?

Why should some materials (and appellee itself had materials under other defense contracts having no partial payment-title transfer clauses) (R. 96) be protected from local taxation and others not?

If this protection can be so provided or not provided by the mere use of or failure to use words in a contract or by the exercise or failure to exercise contract prerogatives by a contractor, the essence of governmental immunity which is the sovereign freedom from control or interference has become something which can be turned on and off by individuals like a water faucet.

Inconsistent Effect on Contractors and Taxing Units of Title Transfer

The logical result of this contract-created-immunity produced by these partial payment-title transfer clauses (if it can be so created legally) is to provide situations where manufacturers even in the same tax jurisdiction are subject to taxation or not subject to taxation depending on their respective whims or financial needs in the exercise of their rights under this type of Government contract clause—not to mention other manufacturers having no Government contracts, who have no such method available to them to escape their tax responsibilities.

So far as the local community is concerned, manufacturer A then may, if he has a Government contract with a partial payment title transfer clause in it, by merely asking for and receiving such a payment, immediately immunize his

entire inventory from local taxation and escapes payment thereby of his fair share of the costs of local government services. On the other hand, manufacturer B, who also has a Government contract, failing to take advantage of such a contract clause or without such a clause in his contract, must pay his full taxes and share the cost of local government even as manufacturer C who has no government contract at all.

The illustration afforded by the comparison of the three manufacturers, A, B and C above, demonstrates how a wise decision dictated by necessity such as Chief Justice Marshall's, can be extended and distorted by those seeking to take advantage of it, to the ultimate absurdity, purely for selfish purposes. Obviously this has no relation whatever to the fundamental philosophy of Government immunity, i. e. the Federal Government's protection from hostile state action or attemps to control or destroy that government or its institutions. The Chief Justice warned that attempts would be made to extend his opinion beyond its proper limits and here is a perfect example of such an attempted extension. *(M'Culloch v. Maryland, 4 Wheat. 609) supra.*

E. Allegheny Compared and Distinguished

How does this assessment and tax compare with tax levy involved in *United States v. Allegheny County*, 322 U. S. 174, wherein this Court invalidated a tax the majority opinion said was "on" personal property of the United States?

The taxes in *Allegheny* were assessed under real property assessment laws which, in Pennsylvania, as well as Michigan and in most States, make the property described the subject and object of the assessment and levy. In ad-

dition, the tax levy included, or so this Court held, machinery in or on the real estate assessed whether owned by the owner of real estate or not, and, as the majority opinion described it, "* * * the substance of this (the real estate tax) procedure is to lay an *ad valorem* general property tax on property owned by the U. S. (the machines)." (p. 185, U. S.).

The Court further said that:

> "This form of taxation is not regarded as a form of personal taxation, but rather as a tax against the property as a thing." (p. 184 of U. S.).

As we have shown, our personal property taxation is regarded as a form of personal taxation rather than as a tax against the property as a thing and so is not within the proscription of *Allegheny*.

The tax here is against the person, rather than the property, and is purposely designed to fix responsibility upon the taxpayer so that the taxes can be collected from him, because of the transient nature of personal property.

Once the Court in *Allegheny* came to the conclusion (which conclusion was contrary to the facts and the repeated decisions of the Pennsylvania Supreme Court, as the dissenting opinions pointed out), that the substance of the assessment procedure under Pennsylvania law was to lay an *ad valorem* general property tax on United States property, the issue was decided. Much that follows in the opinion was explanatory or dicta. Subsequent decisions of this Court have stricken the foundations from the majority opinion.

Distinctions From and Conflicts With Allegheny in Subsequent Decisions

Cases like *Esso*, *supra*, attempt to distinguish the facts in those cases from those in *Allegheny*, but the distinctions are technical, having little or nothing to do with underlying principle of constitutional immunity as laid down by Chief Justice Marshall in *M'Culloch v. Maryland*, and as defined by *Thomson v. Union Pac. R. R.*, and *Union Pac. R. R. v. Peniston*, *supra*, and re-affirmed by Chief Justice Hughes in *Draco*, *supra*.

To say, as the Court did in *Esso* that it makes a difference whether a tax is measured by the "quantity" of Government property in a contractor's hands rather than the "worth" thereof (so far as its effect on the operations of the Government or whether it is a tax on the "means of government operations" affecting its validity or invalidity under the immunity doctrine), is merely an attempt to distinguish the indistinguishable, an attempt to skirt around some of the explanatory phrases or dicta in *Allegheny*.

The storage of the Government's gasoline by Esso for hire was a bailment with Esso as the "bailee", as was Mesta in *Allegheny*, or, more properly, the lessee. On principle the distinctions drawn between *Esso* and *Allegheny* cannot be rationalized under the immunity doctrine.

New Brunswick and *S. R. A.*, *supra*, are out of harmony with the explanatory language of *Allegheny* when this Court holds that property to which the Government holds title (albeit the vendor's interest, which moneywise may be greater than the vendee's interest) may be assessed for an *ad valorem* real property tax at its full value (not "measured by the quantity" of the property). There was no attempt in those cases by the taxing authorities to apportion the value between buyer and seller as to their interests.

The taxes in *S. R. A.* and *New Brunswick supra*, were *ad valorem* assessments against the property (as all real estate assessments, with few exceptions, are) and not against the vendee's equitable interest. The tax could be collected however by selling the vendee's interest only. The only separation of interests was on foreclosure, not in the assessment. The tax here involved can be collected by suit in assumpsit against the taxpayer personally or by selling any of its personal property, and there can be no foreclosure of any Government property.

No comparison can be made between property purchased or already owned by the Government as these machines were in *Allegheny*, and property not bought or intended to be bought by the Government but to which only title is taken, as here, for financial protection.

The Supreme Court of Pennsylvania in *Allegheny, supra*, found that the incidence of the tax was on Mesta, a private manufacturer, based on historic precedents of that court in interpreting the State tax laws involved. The value of machinery in a mill or factory under those decisions, whether owned by the owner of the mill or factory or not, could be included as a part of the valuation of the mill or factory for tax purposes but the lien for such taxes only attached to the real estate and not such machinery.

This was a determination by the State's highest Court of the incidence of the assessment and, no Federal contract rights or interests being involved in that determination, should have been final and conclusive on this Court, as Justice Frankfurter so stated in his dissent and in accord with such decisions of this Court as *Federal Land Bank v. Bismarck, S. R. A. v. Minnesota, Alabama v. King & Boozer, supra.*

The fact that the tax in *Allegheny* was an *ad valorem* property tax and not a privilege tax should have made no difference if the incidence was not on the Government and the Government was protected as in *Offutt, S. R. A., New Brunswick supra.*

As we have heretofore shown, *Allegheny*, is distinguished from the facts and law here involved and further is out of harmony with correct principles of *Draco, King & Boozer, Graves v. New York, S. R. A.* and *New Brunswick, Esso, Halvering v. Mountain Producers, Oklahoma Tax Com. v. Texas Co., supra*, and with the basic philosophy of *M'Culloch, Thomson* and *Peniston, supra.*

Both Justice Roberts and Justice Frankfurter (dissenting) were agreed that the majority decision in *Allegheny* could not be reconciled with *Draco* or *King & Boozer* and that if those two decisions were followed, the facts in *Allegheny* were within their principles as imposing no unconstitutional burden on the Government, the direct burden of the tax levy being against an independent contractor and its property, Government property being used merely to enhance the value of the contractor's property.

As Justice Roberts said (p. 193, 322 U. S.):

> "In this case, as I think, the court necessarily reverts to the test of burdensomeness by a form of words and, as a result, again plunges the applicable principle into confusion."

And as Justice Frankfurter said (p. 195, 322 U. S.):

> "This controversy is treated by the Court as though it presented a challenge by Pennsylvania to the authority of the United States. The case is not entitled, on the facts as I understand them, to have such importance attributed to it."

The lower Court's decision in this case by its reliance almost solely on *Allegheny* also reverts to the test of burdensomeness by a form of words in the State law and the contract and has treated this controversy as though it presented a challenge by the City of Detroit and the County of Wayne to the authority of the United States.

The facts here do not justify such conclusions.

Exemption May Not Be Created Indirectly If It Cannot Be Created Directly, Where Not Constitutionally Implied

Under cases previously cited, property of a contractor used by a contractor in the performance of a Federal Government contract is subject to state taxation, and the contracting parties cannot change the rule by stating in the contract that such property "is exempt from state taxation." Such a provision would require specific congressional authorization. The Constitutional implication of immunity not being applicable to the contractors' materials, mere changing of title without anything else does not change their character under such doctrine.

In the instant case, the Government contracting officers have attempted to do by indirection what they could not accomplish directly. So far as the effect of the questioned "title" clause is concerned, the contracting parties might as well have made an outright statement in the contract that the "property is exempt" since it is reasonably obvious that nothing else was intended to be accomplished except possibly financial protection in the nature of a lien. See *U. S. v. Lennox*, 225 F. 2d 302, discussed in question II, *supra*.

As a matter of fact, this transfer of title to the Government, with appellee retaining possession would be void as to

creditors under local recording acts. It certainly is not in accord with ordinary business practices.

If this practice is approved, the Government will be able to have its cake and let someone else eat it. A convenient arrangement if you want to avoid the responsibilities of ownership but still have the benefits thereof.

Summation

We suggest that the words of this Court in *Oklahoma Tax Commission v. U. S.*, 319 U. S. 598, 610, should be given serious thought in the consideration and decision of this case:

> "Recognizing that equality of privilege and equality of obligation, should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves v. New York*, 306 U. S. 466, 83 L. Ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466, permitted States to impose income taxes upon government employees and *Helvering v. Gerhardt*, 304 U. S. 405, 82 L. Ed. 1427, 58 S. Ct. 969, permitted the federal government to impose taxes on state employees. *O'Malley v. Woodrough*, 307 U. S. 277, 83 L. Ed. 1289, 59 S. Ct. 838, 122 A. L. R. 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 82 L. Ed. 907, 58 S. Ct. 623, *supra*, repudiated former decisions seriously limiting state and federal power to tax. See also *Metcalf v. Mitchell*, 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172, and *James v. Bowe Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208, 114 A. L. R. 318. The trend of these cases should not now be reversed."

If appellee is relieved from payment of these taxes, then there will be *equality of privilege* for this corporation and

others similarly situated in Michigan and elsewhere but *inequality of obligation.*

In conformity with this recently established trend of stringently restricting the scope of the doctrine of the implied immunity of the Federal Government from taxation, this Court now looks to the formal identity of the tax payer. Where the legal incidence of a tax falls upon a contractor and not on the Government, no immunity is established even though the indirect effect of the tax is to increase the cost of the Government. The identity of the tax payer upon whom the tax is imposed is of controlling importance under the "legal incidence" or "direct burden" test as the cases previously discussed illustrate.

It may be that "the power to tax involves the power to destroy" if unlimited, but the converse is equally true. We submit that the power to claim tax immunity involves the power to destroy local government of the power of the United States procurement officials to create such immunity for private industry by contract is unlimited. There is no express exemption in the Federal Constitution or statutes. The same salutary judicial principles which prevent taxation from becoming oppressive to the Federal Government, likewise should prevent tax exemption from becoming oppressive to local government. When it is asserted by the Government that the "right" to tax exemption can be extended to private industry by provisions in contracts with private persons, the salutary principles upon which tax immunity was originally predicated cease to have any application. There is no threat here to destroy the Federal Government or any of its instrumentalities. There is however a threat here to seriously cripple local government.

In general we contend for the proposition that tax immunity is not absolute but is co-extensive with the threat to

sovereignty and ceases when the threat ceases; that there is no threat in this field of taxation and indeed no burden at all except that created by the contracts of the parties; and that in ascertaining the existence of a threat to sovereignty we are not concerned with nominal title or ownership or types of taxes nor with the form or framework of transactions, ingeniously devised by over-zealous public servants, but are concerned only with substance and realities.

Where the tax is non-discriminatory and there is no interference with the functioning of the Federal Government and the incidence of the tax falls upon private interests or persons, this Court has rightly refused to invalidate the imposition of such a tax.

As this Court said in *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342, pp. 364-365:

> "The Mountain Producers Case (*Helvering v. Mountain Producers*, 303 U. S. 376, 82 L. Ed. 907) was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax.
>
> Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with govern-

mental functions here asserted to sustain exemption."

The practical effect of the lower Court's judgement in this case, if left to stand, is that an important segment of private business may be immunized from the payment of State and local taxes throughout the Country with no compensationary benefit to the United States except economic. We submit that the use of such contract-created-titles should not be permitted to transform what is essentially a tax imposed on a contractor as a private person into a tax imposed on the Government and thereby create immunity where none existed before.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments affirmed below should be reversed and the complaints dismissed.

Respectfully submitted,

CITY OF DETROIT, a Michigan municipal corporation, Petitioner and Appellant,
By: PAUL T. DWYER,
Its Corporation Counsel,
VANCE G. INGALLS,
JULIUS C. PLISKOW,
G. EDWIN SLATER,
Assistants Corporation Counsel,

and

COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Petitioner and Appellant,
By: GERALD K. O'BRIEN,
Prosecuting Attorney and
HOBART TAYLOR, JR.,
THOMAS J. FOLEY,
ELIZABETH L. STACK,
Assistant Prosecuting Attorneys,

and

ALBERT E. CHAMPNEY,
Of Counsel.

APPENDIX

STATUTES, REGULATIONS, CHARTER PROVISIONS, ETC.

Chapter 3—Procurement of Supplies and Services by Armed Services—C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et. seq.

§151. PURCHASES and contracts for supplies and services—(a) Applicability to all Armed Services.

The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics, (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

* * * * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

* * * * * *

(10) for supplies or services for which it is impracticable to secure competition;

* * * * * *

§153.

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151 (c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(c) All contracts negotiated without advertising pursuant to an authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Feb. 19, 1948, c. 65, §4, 62 Stat. 23; Oct. 31, 1951, c. 652, 65 Stat. 700.

§154.

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter exe-

cuted in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provisions for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for; upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree. Feb. 19, 1948, c. 65, §5, 62 Stat. 24.

R. S. §3648; 31 U. S. C. A. 529 (as amended Aug. 2, 1946, c. 744, 60 Stat. 809)

§529. ADVANCES OF PUBLIC MONEYS, PROHIBITION AGAINST

No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment

of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.

C. 288, Title III, §305, 63 Stat. 396, June 30, 1949, 41 U. S. C. A. 255

255. ADVANCE PAYMENTS ON NEGOTIATED CONTRACTS; GOVERNING TERMS

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shall be made only upon adequate security and if the agency head determines that provisions for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropiate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for; and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

C. 593, 55 Stat. 838, Sec. 201, 50 U. S. C. A. 1946 ed., Sec. 611

"The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: Provided, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: Provided further, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: Provided further, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest: Provided further, That all contracts entered into, amended, or modified pursuant to authority contained in this section shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Dec. 18, 1941, c. 593, Title II, §201, 55 Stat. 839; Jan. 12, 1951, c. 1230, §1, 64 Stat. 1257."

C. 440, 54 Stat. 676, 50 U. S. C. A. Sec. 1151

"Whenever in the opinion of the President of the United States such course would be in the best interests of national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy, or the Secretary of the Treasury in the case of Coast Guard contracts, is authorized to advance, from appropriations available therefor, payments to contractors in amounts not exceeding 30 per centum of the contract price, upon such terms as such Secretary shall prescribe, and adequate security for the protection of the Government for the payments so made shall be required. The Secretary concerned is further authorized in his discretion to make partial payments on the balance of the contract price from time to time during the progress of the work, such partial payments not to exceed the value of the work already done, but to be subject to a lien as provided by the Act of August 22, 1911 (37 Stat. 32; 34 U. S. C., §582), entitled 'An Act authorizing the Secretary of the Navy to make partial payments for work already done under public contracts': Provided, That the Secretary concerned shall report every three months to the Congress the advance payments made under the authority of this section. June 28, 1940, c. 440, Title I, § 1, 54 Stat. 676."

12 F. R. 7693, 7704 (Apr. 5—407.2(1))

"Partial Payments—Partial payments, which are hereby defined as payments prior to delivery on work in progress for the Government under this contract, may be made upon the following terms and conditions.

"(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon prop-

erty acquired or produced by it for the performance of this contract: Provided, that such partial payments shall not exceed 90 percent of the cost to the Contractor of the Property upon which payment is made which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract exceed 80 percent of the total amount authorized to be expended under paragraph 5 of this Letter Contract.

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production; Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder, or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, ma-

terials, fabricated parts, and other things called for hereunder) title to which is or may hereafter become vested in the Government pursuant to this Clause will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Clause, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the Contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Clause shall vest in the Contractor.

"(e) The provisions of this contract referring to 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Clause. The provisions of this Clause shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

"(f) If this contract (as heretofore or hereafter supplemented or amended) contains provisions for Advance Payments and in addition if, at the time any partial payment is to be made to the Contractor under the provisions of this partial payments clause any unliquidated balance of advance payments is outstanding, then notwithstanding any other provisions of the Advance Payments Clause of this contract the net amount, after appropriate deduction for liquidation of the advance payment of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Clause, and shall thereafter be withdrawn only pursuant to such provisions."

Compiled Laws of Michigan 1948, 211.1

"Property subject to taxation. Section 1. *The People of the State of Michigan enact*, That all property, real and Personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Compiled Laws of Michigan 1948, 211.10

"Annual Assessment. Sec. 10. An assessment of all the property in the state, liable to taxation, shall be made annually in the several townships, villages and cities

thereof by the supervisors of the several townships and wards, or in villages and cities where provision is made in the acts of incorporation or charter for some other assessing officer, then by such assessing office, as hereinafter provided."

Compiled Laws of Michigan 1948, 211.40

"Property taxes; lien, priority. Sec. 40. The taxes thus assessed shall become at once a debt due to the township, city, village and county from the persons to whom they are assessed, and the amounts assessed on any interest in real property shall, on the first day of December, for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof. And all personal taxes hereafter levied or assessed shall also be a first lien, prior, superior and paramount, on all personal property of such persons so assessed from and after the first day of December in each year for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, and so remain until paid, which said tax liens shall take precedence over all other claims, encumbrances and liens upon said personal property whatsoever, whether created by chattel mortgage, title retaining contract, execution, or upon any other final process of a court, attachment, replevin, judgment or otherwise, and whether such liens, claims and encumbrances created by chattel mortgage, title retaining contract, execution or upon any other final process of a court, attachment, replevin, judgment or otherwise, become effective prior to the effective date of this act or subsequent thereto, and

no transfer of personal property assessed for taxes thereon shall operate to divest or destroy such lien, except where such personal property is actually sold in the regular course of retail trade. The personal property taxes hereafter levied or assessed by any city or village shall be a first lien, prior, superior and paramount to any other claims, liens and encumbrances whatsoever upon the personal property assessed as herein provided, any provisions in the charter of such cities or villages to the contrary notwithstanding."

Local Act. Michigan. No. 6. 1943, Sections 1, 2 and 4

"Sec. 1. That hereafter when the assessment rolls of the different wards in the city of Detroit, for city taxes, are annually, fully and finally confirmed, as prescribed by the provisions of the city charter, it shall be the duty of the board of assessors of said city to make a copy of the assessment roll of each of said wards, to be known as the state and county tax rolls, upon which said board of assessors shall, upon receipt of the certificate of the clerk of the board of supervisors of said county, stating the amount of taxes apportioned to each ward, ratably assess the state and county taxes, as provided by the general laws of the state, to each of which tax rolls said board of assessors shall annex a warrant signed by the members thereof directed to the county treasurer commanding him to collect from the persons liable therefor the several sums listed therein as taxes, and which tax rolls and warrants the said board of assessors shall deliver over to the treasurer of said county on or before the tenth day of November in each year."

"Sec. 2. The county treasurer, upon the receipt of said rolls, shall cause a notice to be published in 3 daily

papers published in said city, stating that said rolls and warrants have been made and deposited in his office by the said board of assessors, and giving the time and manner of payment of such taxes and the penalties prescribed for the non-payment thereof. The treasurer shall also mail, to each taxpayer at his last known address on said tax rolls, a statement showing the description of the property against which the tax is levied and the amount of the tax thereon. Failure to publish said notice or send or receive such notice shall not in any way prejudice the right to collect or enforce payment of any tax. The county treasurer shall, beginning December first of each year, proceed to collect such taxes. He shall receive taxes and issue receipt therefor without interest, charges or penalty on all sums voluntarily paid on or before the fifteenth day of January of the succeeding year; upon all taxes paid after said fifteenth day of January, he shall add a collection fee of 4 per cent. From and after the first day of March next after said assessment, said taxes shall be considered delinquent within the meaning of the general tax statutes, and the county treasurer shall, in addition to said collection fee of 4 per cent, add and collect interest on said tax computed at the rate provided by the general tax laws for the collection of delinquent property taxes."

* * * * * *

"Sec. 4. After the fifteenth day of January in each year after taxes upon personal property have been levied and at any time until said personal property taxes assessed in said rolls as aforesaid are paid or are ordered stricken from the rolls as hereinafter provided, the county treasurer may collect the same by seizing the personal property so assessed or any other personal property of any person liable for said tax to an amount sufficient to pay such tax, interest, fees and charges for subsequent sale

wherever the same may be found in the state and from which seizure no property shall be exempt. He may sell the property seized to an amount sufficient to pay the taxes, interest, fees and charges at public auction in the city of Detroit or, if seized outside of said city, then in the place where the property is seized. He shall give public notice at least 5 days previous to the sale by posting written or printed notices in 3 public places in the city, village or township where the sale is to be made, which sale may be adjourned from time to time as said treasurer may deem necessary. If the property cannot be sold for want of bidders, it shall be returned, and the tax shall remain due as though no seizure was had. If the property sold brings more than the amount of taxes, interest and charges, the balance shall be returned to the person from whose possession the property was taken. After the fifteenth day of January in each year after said taxes upon personal property have been levied, and at any time until said personal property taxes assessed on said rolls as aforesaid are paid or ordered stricken from the rolls as hereinafter provided, the county treasurer may sue in the name of the county of Wayne the person or persons liable for said tax on personal property by action in any court of law, and he shall have, use and take all lawful ways and means provided for the collection of debts to enforce the payment of such tax. The tax rolls shall be *prima facie* evidence of the indebtedness by such person and of the regularity of the proceedings by which such tax was assessed and levied. In case the county treasurer may be apprehensive of the loss of any personal tax assessed upon his roll, he may proceed at any time to enforce its collection as aforesaid, and if compelled to seize property or bring suit, may add interest and collection fees in accordance with the general tax laws, up to the date of sale or judgment, in addition to the charges for sale and suit."

Section 1, Chapter II, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. Assessments shall be made according to assessment districts, the boundary lines of which shall conform to ward boundaries as established from time to time by the common council. There shall be an assessment roll in book form for each such district. All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not."

Section 2, Chapter II, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"In all assessments, the lands, tenements and subdivisions assessed shall be described by referring to the number and section of the lot and the name of the owner or occupant thereof, and if the number and section of any lot, or the name of the owner thereof can not be ascertained, then by such other sufficient description as the board of assessors may deem proper. If, by mistake or otherwise, any person may be improperly designated as the owner of any lot, tenement, or premises, such assessment or tax shall not for that cause be vitiated, but the same shall be a lien on such lot, tenement or premises, and collected as in other cases. If any lot or lots shall lie partly in two or more districts, the same shall be assessed in the district where the greater portion of said lot or lots is situated."

Section 6, Chapter II, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"The council or committee shall hear and determine all appeals in a summary manner and correct any errors which they may discover in the assessment rolls; shall place thereon the names of any persons and the descriptions of any property not already assessed and assess the same; and may increase or diminish any assessment as they see fit: Provided, that the counsel or such committee shall not increase any assessment without giving a reasonable opportunity to persons owning or having charge of the same, if known, to appear and object thereto. The consideration of the assessment rolls and hearing of appeals may be continued from session to session for a period not less than five days of exceeding sixteen days after the date of their delivery to the council. The committee shall make a report to the common council in the premises and the council may adopt, change or amend the same, in whole or in part. After due consideration thereof, said rolls shall be fully and finally confirmed by the council, and shall remain as the basis, according to property valuation, of all taxes to be levied and collected in the city until another assessment shall have been made and confirmed as herein provided. In the event that any date set forth in this chapter falls on a Sunday or legal holiday, such time shall be extended to the next succeeding business day."

Section 7, Chapter II, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"Sec. 7. After the assessment rolls shall have been fully and finally confirmed, it shall, as herein provided, be the duty of the board of assessors to cause the amount of all taxes, in dollars and cents, authorized to be assessed and collected in each year, to be ratably assessed to each person named or lots described, upon and according to the aggregate valuation which such person or lots shall have been assessed in said assessment rolls. Such ratable assessments shall be entered in a book prepared for that purpose to be known as the tax roll for each district, in a column showing the amount of city taxes assessed to each person or lot in each year. Such tax rolls shall contain columns for the names and addresses of all persons assessed hereunder. When said tax rolls shall have been completed, the board shall deliver the same to the controller, who shall cause the same to be delivered to the city treasurer on the first day of July, take his receipt therefor and charge him therewith. All city taxes shall become a debt against the owner from the time of the listing of property for assessment by the board of assessors."

Section 1, Chapter IV, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed. The owners or occupants or parties in interest to any real estate assessed hereunder shall be liable to pay such taxes, and all assessments levied in accordance herewith. The owners or persons in possession of any personal property shall pay all taxes assessed thereon."

Section 26, Chapter IV, Title VI, City Charter, 1918 (1952 Ed.)

"On and after the 26th day of August in each year and at any time until the taxes mentioned herein are paid, the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other that real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. Six days' notice of any such sale shall be given by the City Treasurer by publication in the official newspaper. Whenever such sale shall have been made the proceeds thereof shall be applied to the payment of the taxes and percentage and the expense of such sale, and any surplus remaining thereafter shall be paid over to the owner of such property or other person entitled to receive the same. The City Treasurer shall have power in the name of the City to prosecute any person or corporation refusing or neglecting to pay such taxes or any special assessment by a suit in the Circuit Court for the County of Wayne, and he shall have, use and take all lawful ways and means provided by law for the collection of debts to enforce the payment of any such tax or any special assessment. The tax rolls or unit cards after the tax has been transferred thereto shall be prima facie evidence of the indebtedness of such person and the regularity of the proceedings by which such tax or assessment was assessed and levied. All city taxes upon personal property shall become on said fifteenth day of July a lien thereon and so remain until paid and no transfer of the personal property assessed shall operate to divest or destroy such lien."

Section 27, Chapter IV, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"All city taxes upon personal property and real estate and special assessments thereon, in addition to being a lien upon the property assessed shall become a debt against the owner from the time of the listing of the property for assessment, and shall remain a debt against the owner of the property or his estate after his death, until the same are paid."

(P. 608)

(§1307) W. D. Contract Form No. 7

LETTER ORDER FOR SUPPLIES
(No Price Stated).

Contract No. .....
(Negotiated)
Date .....
Place .....

.....
(Contractor)
.....
(Address)

Gentlemen:

(§1307.1) 1. An order is hereby placed with you for the manufacture and delivery to the Government of the following supplies:

.....

.....

.....

(§1307.2) 2. You are directed, upon your acceptance of this order, to proceed immediately to furnish the necessary materials, jigs, dies, fixtures, and gages, and other machinery and equipment,[1] and to commence the manufacture of the supplies called for in paragraph 1, and to pursue such work with all diligence to the end that the supplies may be delivered to the Government at the earliest practicable date.

(§1307.3) 3. All applicable articles (other than the article "Termination for the Convenience of the Government") now required by Federal Law, Executive Order, or War Department Procurement Regulations to be included in contracts for supplies of the kind herein described are incorporated herein by reference.

(§1307.4) 4. By your acceptance hereof, you undertake without delay to enter into negotiations with the War Department looking to the execution of a definitive contract which will follow in the main War Department Contract Form No. 1[2] and will include all applicable articles then required by Federal Law, Executive Order, and War Department Procurement Regulations to be included in contracts for supplies of the kind herein described. The definitive contract will also contain a detailed delivery schedule and prices, terms and conditions as agreed to by the parties, which may or may not be at variance with the provisions of this order.

(Footnote §1307.2) (1) As to cases where it is anticipated that the contractor will have to purchase machinery or equipment (other than jigs, dies, fixtures, and gages) in an estimated amount of more than $100,000, see paragraph 1068.)

(Footnote §1307.4) (1) With appropriate modifications, this letter order may also be used where the definitive con-

tract is to be written on a fixed-price contract form for supplies other than W. D. Contract Form No. 1.)

(§1307.5) (5) Pending the execution of a definitive contract, each expenditure, order, subcontract or commitment made by you in furtherance of the performance of this order—

(a) for machinery or equipment other than jigs, dies, fixtures or gages, or

(b) for an amounts in excess of.....Dollars ($.....), will be subject to the written approval of the Contracting Officer, and you are not authorized to expend or obligate, in furtherance of your performance hereunder, more than.....Dollars ($.....) in the aggregate.

(§1307.6) 6. (a) In case a definitive contract is not executed by....., 19.... (or any subsequent date at any time mutually agreed upon) because of the inability of the parties to agree upon a definitive contract, this order will terminate on the stated date or such subsequent date, as the case may be.

(b) The Government may at any time terminate this order in whole or in part for its convenience by giving you written notice of such termination.

(c) In the event of any termination pursuant to either paragraph 6 (a) or paragraph 6 (b) of this order, you and the Contracting Officer will attempt to agree by negotiation upon a settlement estimated by the parties to be the aggregate amount (less payments previously made to you) of the costs incurred by you in the performance of this order and the amounts paid or to be paid by you or for your account in settling with the approval of the Contracting Officer your obligations for commitments made in the performance of

this order. *In case of termination pursuant to paragraph 6 (b), such negotiated settlement may include a reasonable allowance for profit.* Any such negotiated settlement shall be embodied in a Supplemental Agreement.

(d) If you and the Contracting Officer are not able to agree upon such a negotiated settlement within 90 days after the effective date of the termination (or within such longer period as at any time may be mutually agreed upon), the Gov-

ernment binds itself (without duplication of any of the following payments or of payments previously made) to reimburse you for the costs incurred by you in the performance of this order and for any amounts paid by you or for your account in settling with the approval of the Contracting Officer your obligations for commitments made in the performance of this order. In lieu of reimbursing you for expenditures made by you in settling any of your obligations for commitments, the Government, in the discretion of the Contracting Officer, may assume such obligations or any of them. The total of such reimbursement (and of all payments previously made), together with the amount of any obligations assumed, shall not exceed the amount above specified.

If such termination shall take place pursuant to paragraph 6 (a) of this order no allowance of profit will be made to you. If termination shall take place for the convenience of the Government pursuant to paragraph 6 (b) of this order, such allowance of profit will be made to you with respect to the work done by you prior to the effective date of the termination as the Contracting Officer may find to be reasonable under all the circumstances.

(e). The Government may permit you to sell or retain at prices or on terms agreed to by the Government any equipment, completed supplies, materials or work in process and the proceeds of any such sale, or such agreed prices, shall be paid or credited to the Government in such manner as the Contracting Officer may direct.

(f) Upon payment or reimbursement to you pursuant to paragraph 6 (c) or 6 (d) of this order, title to all equipment, completed supplies, work in process, materials, plans, information, and other things, for which you are so paid or reimbursed (except such property as may be sold or retained by you as above provided) will vest in the Government (if title thereto has not already become vested in the Government). The Government will also become entitled to any rights under any commitment which it may assume, or for the settlement of which it shall have reimbursed you.

(g) Any dispute which arises under this paragraph 6 regarding the matter of fact *(including any dispute* (1) *as to whether termination has in fact taken place for the convenience of the Government or because of the inability of the parties to agree upon a definitive contract, or* (2) *as to the extent of any allowance of a profit in the event of a termination for the convenience of the Government)* will be treated and resolved as a dispute under the "Disputes" article incorporated in this order by reference.

(h) Partial payments on account of any amount admittedly due to you pursuant to this paragraph 6 may be made by the Government at any time in the discretion of the Contracting Officer.

(1506.7) 7. After your acceptance hereof, partial and advance payments, in accordance with regulations from time to time applicable, may be made to you upon your application.

(§1307.8) 8. The sums to be expended by the Government hereunder are chargeable to the following allotments, the available balances of which are sufficient to cover the same: .....

(§1307.9) 9. Your acceptance of this order will be indicated by affixing your signature to this letter and two copies thereof, and mailing or delivering the executed original and one executed copy to the Contracting Officer not later than ....., 194.... Such acceptance will constitute this order a contract on the terms set forth herein.

(§1307.10) 10. This instrument is authorized by and has been negotiated under the First War Powers Act, 1941, and Executive Order No. 9001.

United States of America
By .....
.....
(Official Title)
(Corporate Seal)

Accepted ....., 19....
.....
(Contractor)

By .....
(Title)

.....
(Address)

(Footnote 1307.6) (1) Where the letter order is for an amount less than $20,000, the "Disputes" article will not have been incorporated by reference by virtue of paragraph 3 or 6 (g) of this letter order, since contracts in such amount are not required to contain that article (See paragraph 3261). In that event the language of the letter order will be appropriately modified expressly to incorporate by

reference either the "Disputes" article set forth in paragraph 326 or that contained in General Provision 12 of W. D. Contract Form No. 18 (paragraph 1317-B.2).

Opinion, Attorney General of Michigan 1928-30, p. 176

TAXATION: (a) A personal property tax is an assessment against the person rather than the property.

(b) Personal property assessments against executors and administrators make them personally liable for the amount of the tax where the estate is permitted to be closed and distributed without payment thereof.

January 8, 1929.

Mr. Raymond R. Kendrick,
City Attorney,
Saginaw, Michigan.

Dear Sir:

Your letter of December 17th propounds the following query:

> "A question has arisen as to whether or not the estate of a deceased person which is closed, its assets distributed and the administrator discharged, subsequent to the final completion of the assessment rolls and before taxes levied upon the assessment fall due, is liable for such taxes subsequently falling due. If such liability exists, from whom can collection be made?
>
> "A similar question arises with reference to corporations which are dissolved or go out of existence during the period after the assessment rolls are made up."

You state that your inquiry relates solely to personal property.

Section 14 of Act No. 206, Public Acts of 1893, as amended, being the General Tax Law, provides in part as follows:

> "* * * Fifth, The personal property belonging to the estates of deceased persons, in the hands of the executors, administrators or trustees, appointed under the last will and testament of such deceased person, or by any court of competent jurisdiction, shall be assessed to them in the township and in the school district where the deceased last dwelt, until they shall give notice to the supervisor or other assessing officer that the estate has been distributed to the legatees or beneficiaries or other persons entitled thereto. If such deceased was a non-resident of the State such property shall be assessed in the township where situated, to such executors, administrators or trustees, or to the person in possession; * * *".

Section 17 of the law provides that:

> "No change of location or sale of any personal property, after the first day of May in any one year shall affect the assessment made in such year. * * *"

It is thereupon provided by Section 40 that:

> "The taxes thus assessed shall become at once a debt to the township, ward or city from the persons *to whom they are assessed*. * * * And all personal taxes shall also be a lien on all personal property of such persons so assessed from and after the first day of December in such years. * * *"

In addition to the remedy of seizure, distraint and sale provided by law in case of non-payment of such taxes, the township treasurer is authorized by section 47:

> "* * * if otherwise unable to collect a tax on personal property, may sue the person, firm or corporation to whom it is assessed, in the name of the township, village or city, and garnishee any debtor or debtors of such person, firm or corporation. The tax roll shall be prima facie evidence of the debt sought to be recovered: * * *"

In considering these provisions it should be borne in mind that a personal property tax is distinguished from a real estate tax in that the former is an assessment against the person, while the latter is against the property. Thus, in *Lacking v Ballantyne*, 132 Mich. 584, the court said:

> "In the case of a tax on land, it may be stated as a general proposition that the land, and not the owner, is taxed. Purchasers and all persons interested in land understand this, and must pay the taxes as a condition of enjoying their property. It is otherwise with personal property. There the tax is against the person, because he owns personal property. It has always been the policy of the law, supposedly in the interest of trade, to make personal property easily transferable, and to secure to purchasers and mortgagees the entire title of the seller and mortgagor."

See also:

St. Johns National Bank v. Township of Riverhead, 143 Mich. 203;

City of Muskegon v. County of Muskegon, 123 Mich. 272;

City of St. Joseph v. Ford, 135 Mich. 276.

In the early case of *Dresden v. Bridge*, 90 Me. 489, 38 Atl. 545, which has apparently become a leading case on the subject, it was held that where a statute provides for the assessment of personal property of deceased persons, not distributed, to executors or administrators, "such assessment makes the executor or administrator personally liable to the taxes. Being personally liable, a suit for the taxes should be brought against him personally and not against the property of the deceased in his hands".

This theory has been adopted and affirmed in the decisions of a great many States and the Supreme Court of our State made a like holding in Township of Orien v. Axford, 112 Mich. 179. In this case the court said:

> "The sole question which need be discussed in this case is whether, under the tax law of 1893, a tax property assessed against the executor of an estate may be recovered in a personal action against him, it appearing that he has distributed the estate after the assessment and before the action brought."

These facts would seem to fit the situation presented by you squarely. In holding the executor liable, the court said:

> "The plain provisions of these sections leave little room for construction. Manifestly, the executor is 'the person to whom the tax is assessed,' within the meaning of this section. Not only is this true, but there is no other person to whom the property can be assessed, in a case like the present, where no notice has been given that the estate has been distributed to the parties interested. If then, the tax cannot be recovered of the executor or administrator, it cannot be recovered at all; and such a legislative purpose is not to be inferred. It is idle to suggest that the township must

resort to the method of filing a claim against the estate. * * * The only way in which this statute can be made effective is to so construe it that the executor, when closing the estate, must provide for current taxes, or, being required to pay the taxes on the estate after distribution, must resort to the distributees for reimbursement."

From a consideration of the foregoing, I am of the opinion that an executor or administrator who permits an estate to be closed and distributed without regard to current assessments against the personal property in his hands, become personally liable for the amount of the same in an action by the municipal corporation to whom the tax is due.

In so far as corporations are concerned, where a dissolution takes place after the assessment, it would seem that this class of tax would fall into the same category as other debts of the corporation to be paid or accounted for as are other debts, having due regard to the provisions of law entitling such obligations to priority, of course, over general claims. The exact order of priority would necessarily have to be determined by reference to the law under which the dissolution takes place. The additional right of the tax collector to assess personal property of the corporation assessed is also available where there are assets.

Yours very truly,

Wilber M. Brucker,
Attorney General.

CR

WARD.....

CITY OF DETROIT
PERSONAL PROPERTY ASSESSMENT ROLL

1952 66

Line	Item Number	Owner or Taxpayer Address	Business and Sales Tax Number	Assessment 1951	Assessment 1952	Statement Filed	Accepted or Not Accepted	Field Appraiser	True and Lawful Assessment Determined by the State Tax Commission
13	639	Murray Corp of America 7700 Russell Detroit 11, Mich	7. Auto C Body 119259	11,155,750	~~11,200,000~~ ~~10,298,000~~ 12,183,180	Feb 13	Assessed Subject to Prior Rights of Federal Government B. of R. 1952 Pet. No. 825 Placed at 12,183,180 Accepted Board of Assessors	R. Howey	Reg #7821